Supreme Court, U.S.
FILED

07-100 JUL 23 2007

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No.

IN THE

Supreme Court of the United States

HARRIS COUNTY, TEXAS,

Petitioner,

v.

KAY STALEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has consistently held that vacatur is "'the duty of the appellate court'" if review of a district court judgment is "prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)). This longstanding practice clears the path for future litigation and eliminates judgments not subjected to appellate scrutiny.

In this case, the district court concluded that a monument located on the grounds of the Harris County Civil Courts Building violated the Establishment Clause. While an appeal of that ruling was pending, this Court issued two decisions that superseded the legal standards on which the district court had relied. The Fifth Circuit ordered an en banc hearing on the Establishment Clause issue, but that hearing was mooted by the removal of the monument pursuant to longstanding renovation plans wholly unrelated to the litigation. Over the dissent of five judges, the en banc court refused to vacate the district court's judgment, and, on that basis, ruled that respondent remains a "prevailing party" entitled to attorneys' fees.

The question presented is whether the court of appeals correctly declined to vacate the judgment of the district court, thereby awarding fees to respondent as a "prevailing party," when factors unrelated to the litigation had mooted the appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harris County, Texas (the "County"), respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's en banc opinion is reported at 485 F.3d 305 (5th Cir. 2007) (en banc). App., *infra*, 1a. The order granting rehearing en banc is reported at 470 F.3d 1086 (5th Cir. 2006). *Id.* 87a. The Fifth Circuit's panel opinion is reported at 461 F.3d 504 (5th Cir. 2006). *Id.* 26a. The district court's opinion enjoining the monument's display of the Bible is reported at 332 F. Supp. 2d 1030 (S.D. Tex. 2004). *Id.* 61a.

JURISDICTION

The district court exercised federal question jurisdiction pursuant to 28 U.S.C. § 1331, and the Fifth Circuit reviewed the district court's judgment pursuant to 28 U.S.C. § 1291. On April 24, 2007, the Fifth Circuit, sitting en banc, entered its judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment, U.S. Const. amend. I, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case raises an important and recurring question that bears directly upon the proper operation of the federal courts. Absent this Court's review, this issue will continue to divide the circuits, impede litigation, and, in factually similar situations, chill the exercise of First Amendment rights.

As the County prepared for oral argument before an en banc panel of the Fifth Circuit, events unrelated to the litigation mooted the County's appeal. Despite this Court's command that vacatur is "'the duty of the appellate court'" when review of a district court judgment is "prevented through happenstance," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994), the Fifth Circuit refused to vacate the district court's judgment based on its mistaken belief that after *Bancorp*, *Munsingwear* no longer requires vacatur in cases mooted by events unrelated to the litigation. As a result, the Fifth Circuit preserved a flawed and anachronistic district court judgment that a three-judge panel of the Fifth Circuit had largely rejected.

The Fifth Circuit's en banc opinion exemplifies the current confusion among the circuit courts regarding the proper way to dispose of cases mooted by events unrelated to the litigation. Certiorari is necessary to clarify the proper application of *Munsingwear* and *Bancorp* to such cases.

1. The Mosher Monument (the "Monument") stood outside of the Harris County Civil Courts Building (the "Courthouse") from 1956 until January 19, 2007, when it was removed to facilitate pre-planned renovations to the Courthouse. *See* App., *infra*, 2a-3a; *id.* 21a (DeMoss, J., dissenting). The Star of Hope Mission, a private Houston charity, built the Monument to honor the charitable work of Houston philanthropist William S. Mosher. *Id.* 27a. In a glass-covered chamber located at the top of the Monument, Star of Hope placed an open Bible, which exemplified the connec-

tion between Mr. Mosher's religious faith and his charitable work. *Id.* 28a. Some time after 1988, the Monument fell into a state of disrepair, and the Bible was temporarily removed. *Id.* 29a. In 1995, a state court judge led a private effort to restore the Monument, which resulted in the cleaning and polishing of the Monument, the repair of the Monument's display case, the replacement of the Bible inside the glass case, and the rededication of the Monument. *Id.* 30a. For nearly fifty years, the Monument stood without legal challenge. *See id.* 27a, 31a.

2. In 2003, Kay Staley, an attorney who practiced at the Courthouse, challenged the Monument's display of the Bible, alleging that it violated the Establishment Clause. *Id.* 31a. Applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the district court held that the Monument's display of the Bible inside the glass chamber violated the Establishment Clause both (i) from the Monument's inception and (ii) after the 1995 rededication. The district court issued an order that both enjoined the Monument's display of the Bible and directed the County to pay Ms. Staley's attorneys' fees. *See* App., *infra*, 85a-86a.

3. The County appealed to the Fifth Circuit. While that appeal was pending, this Court issued two decisions that significantly altered this Court's Establishment Clause jurisprudence. *See McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). A three-judge panel of the Fifth Circuit recognized that Ms. Staley's challenge should be resolved according to *Van Orden* and *McCreary County* rather than *Lemon*. Armed with these new cases, all three members of the panel agreed that the district court erred in holding that the Monument violated the Establishment Clause before the 1995 restoration. *See* App., *infra*, 42a; *id.* 52a (Smith, J., dissenting). A divided panel, however, affirmed the district court's injunction. The two judges in the majority held that, although the Monument did not offend the Establishment Clause during its first forty years of existence, the rededication and subsequent redisplay of the Bible in the glass compartment so changed the context of the

Monument as to render the display of the Bible unconstitutional. *Id.* 43a-45a.

4.a. The Fifth Circuit granted en banc rehearing, "to decide whether, in the factual context presented, the display of a Bible in a monument dedicated to a philanthropic citizen and located on the grounds of the Harris County Civil Courthouse, violates the Establishment Clause." *Id.* 2a. The grant of rehearing "automatically abrogated" the divided panel's decision, but it kept the district court's judgment in effect subject to the en banc review. *Id.* 13a n.5.

About two months before oral argument in the rehearing en banc, it came to the court's attention that the Courthouse where the Monument stood had been closed for renovations. The court raised the issue of mootness and requested that the parties brief that issue. *Id.* 89a. On January 19, 2007, the Monument was placed in storage to facilitate the renovation plan that had been developed years before Ms. Staley filed suit. *Id.* 2a-3a; *id.* 21a (DeMoss, J., dissenting).

The County's subsequent en banc brief vigorously argued that the Monument did not violate the Establishment Clause. The County also recognized, however, that the closure of the Courthouse and removal of the Monument pursuant to a preexisting renovation plan had mooted the case.

b. The rehearing en banc resulted in a majority opinion and two dissenting opinions. The majority held that the removal of the Monument mooted the appeal, and explained that, in light of the fact-sensitive inquiry required by this Court's Establishment Clause jurisprudence, any dispute over the probable future redisplay of the Monument was not ripe. *See id.* 6a. Moreover, it "acknowledge[d] that the bottom-line cause of the [Monument's] removal was related to the ongoing renovations" (*id.* 10a), thereby rejecting any inference that the County removed the Monument as part of a litigation strategy. Nevertheless, the majority refused to vacate the district court's judgment. In so doing, the majority discarded this Court's *Munsingwear* decision, reading *Bancorp* as a "reject[ion of] the longstanding rule reflected in

Munsingwear" (*id.* 7a), such that "*Bancorp*, [and] not the earlier case of *Munsingwear*, [] control[led] [the] decision." *Id.* 10a. Based on an ad hoc analysis of the "equities"—primarily the fact that the County "voluntarily" mooted the case after respondent obtained "full relief" in the district court—the majority concluded that vacatur was not appropriate. *Id.* 10a-14a.

The en banc majority then examined the question of attorneys' fees. *Id.* 15a. Even though the district court had relied on superseded precedent to decide the case, and mootness had deprived the County of the ability to contest the merits of the judgment, the majority held that Ms. Staley was entitled to fees by virtue of the court's own refusal to vacate the judgment. *Id.* "Given our opinion today," the court explained, "Staley has obtained the primary relief she sought and therefore remains the prevailing party." *Id.* Accordingly, it remanded the case to the "district court solely for a determination of appropriate attorneys' fees for Staley." *Id.*

Five judges dissented. Judge Garza, joined by Judge Clement and Judge Owen, took issue with the majority's conclusion that the case was moot. *Id.* 16a (Garza, J., dissenting). Judge Garza argued that when voluntary cessation of the challenged conduct terminates a controversy, the case should be dismissed as moot only when it is "absolutely clear that the . . . violation . . . could not reasonably be expected to recur." *Id.* 17a (Garza, J., dissenting). And he believed that the record before the court was insufficient to resolve the question of whether the violation might recur. *Id.* 17a-18a (Garza, J., dissenting). Accordingly, Judge Garza suggested that the case be remanded to the district court for additional fact-finding and an initial mootness determination. *Id.* 18a (Garza, J., dissenting).[1]

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[1] The redesign of the Courthouse and plaza will make it physically impossible to return the Monument to its past location. The County has not made a decision regarding any aspect of the future display of the Monument. *See* App., *infra*, 6a. Accordingly, the "fact-intensive and

Judge DeMoss, joined by Judge Smith, believed that "the few vacatur rules given to us by the Supreme Court do not directly answer the question" in this case—that is, "whether vacatur is appropriate when voluntary action taken by an appellant moots a case, *but the action taken is completely unrelated to the litigation.*" *Id.* 18a (DeMoss, J., dissenting) (emphasis in original). But Judge DeMoss believed that this situation should be controlled by *Munsingwear*, and he observed that the majority's refusal to vacate the district court's judgment even though the case was mooted by events unrelated to the litigation is "contrary to the decisions by other circuits to vacate under similar circumstances" and thus "creat[es] a circuit split." *Id.* 24a (DeMoss, J., dissenting). Judge DeMoss also took issue with the majority's view that vacatur is to be determined in all cases on the basis of ad hoc equitable factors (*id.* 22a-24a & n.2 (DeMoss, J., dissenting)), noting that "[t]here is no equity in creating a circuit split to leave in place the judgment and remedy in this case." *Id.* 24a (DeMoss, J., dissenting).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's refusal to vacate the district court's decision—despite the inability of the County to appeal—left in place a judgment based on a superseded legal standard. Left untouched, that anachronistic judgment subjects the County to an unjust award of attorneys' fees on the basis of claims it did not have a full opportunity to litigate, will cloud future litigation should the County decide to redisplay the Monument, and will chill the exercise of First Amendment rights.

The en banc court concluded that *Bancorp* wholly abandoned the *Munsingwear* rule of automatic vacatur, even though *Bancorp* expressly "st[oo]d by" *Munsingwear*'s

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[Footnote continued from previous page]

context-specific analysis required by *McCreary* and *Van Orden*" simply cannot be undertaken at this time. *Id.*

statement "that mootness by happenstance provides sufficient reason to vacate." *Bancorp*, 513 U.S. at 25 n.3. That unjustifiable departure from a rule that has been followed for more than fifty years compels review here. Indeed, even if the reasoning of *Bancorp* could fairly be taken to suggest the Fifth Circuit's conclusion that vacatur is never *required*, even in cases of "happenstance," this Court's cases leave no doubt that the Fifth Circuit's duty was to follow *Munsingwear*'s opposite rule until that rule is repudiated by this Court. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Unlike the Fifth Circuit, several courts of appeals continue to follow the rule that vacatur is required in cases of "happenstance," understood to include voluntary conduct by the parties that is unrelated to the litigation. That circuit split on a procedural issue that arises with great frequency is important enough to warrant this Court's attention, for even if this Court agrees that vacatur is not necessarily *compelled* in *all* such cases, the lower courts would plainly benefit from this Court's guidance on the factors that would make vacatur appropriate. This Court should grant certiorari and give clear instructions to the courts of appeals for how to dispose of cases mooted by events that are unrelated to the litigation.

This case is an excellent vehicle for the adjudication of this recurring question. In light of the intervening case law from this Court, the public interest scarcely favors the preservation of the now-outdated district court precedent. Indeed, the Fifth Circuit had voted to hear the Establishment Clause issue en banc—necessarily concluding either that the question was exceptionally important or that there was very good reason to doubt the correctness of the district court's ruling under this Court's cases, or both. *See* Fed. R. App. P. 35(b). Moreover, apart from the perpetuation of highly questionable precedent, the primary tangible effect of the ruling below is to preserve a purported basis for an award of attorneys' fees. That is an anomalous result: Although respondent secured a victory that should be regarded only as "pre-

liminary" in our system of appellate review (*Munsingwear*, 340 U.S. at 40), and no fees could lawfully have been awarded if the merits of the case had "ultimately [been] decided against her" (*Sole v. Wyner*, 127 S. Ct. 2188, 2196 (2007)), the Fifth Circuit nonetheless treated that unreviewable and highly questionable "preliminary" decision as though it were clearly correct, final, and binding for purpose of awarding fees. *Cf. Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 483 (1990); *Alioto v. Williams*, 450 U.S. 1012 (1981) (Rehnquist, J., dissenting from the denial of certiorari, joined by White, J.). Finally, an untested injunction based on superseded precedent can reasonably be expected to chill protected private speech and religious exercise. To adequately protect First Amendment rights, this Court should require vacatur in such cases.

I. The Circuits Are Divided On The Issue Of Whether *Munsingwear* Controls The Disposition Of Controversies Mooted By Voluntary Actions Of The Appellant That Are Unrelated To The Litigation.

1. In a consistent line of cases stretching back for more than half a century, this Court has prescribed a single remedy for cases mooted on appeal by happenstance: "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here . . . is to reverse or vacate the judgment below." *Munsingwear*, 340 U.S. at 39. Moreover, *Munsingwear* itself establishes that "happenstance" has long been understood to encompass those situations in which mootness results from the appellant's own voluntary conduct, if that conduct was unrelated to the litigation.

In *Munsingwear*, the United States sued for both monetary and injunctive relief. The government alleged violations of a regulation setting a maximum pri for the sale of certain commodities. *Id.* at 37. The district court held the claim for damages in abeyance pending a determination of the claim for injunctive relief. *Id.* After the district court held

that Munsingwear's prices complied with the regulation and dismissed the claim for injunctive relief, the United States both appealed and decontrolled the commodity that was the subject of the lawsuit. *Id.* The court of appeals then dismissed the appeal as moot. *Id.* The United States, however, never moved to vacate the district court's judgment. Shortly thereafter, Munsingwear convinced the district court to dismiss the damages claim on the ground of res judicata. *Id.* The court of appeals affirmed that dismissal, and the United States sought relief from this Court.

This Court acknowledged that vacatur is "'the duty of the appellate court'" in cases of mootness by "happenstance." *Id.* at 40 (quoting *Duke Power*, 299 U.S. at 267 (1936)). Despite the fact that mootness had resulted from the voluntary conduct of the United States, the Court stated that vacatur was "commonly utilized *in precisely this situation* to prevent a judgment, unreviewable because of mootness, from spawning *any legal consequences*." *Munsingwear*, 340 U.S. at 41 (emphases added). The Court explained that a lower court decision necessarily is "preliminary" in cases in which an appeal is provided as of right, and noted that vacatur in such cases "clears the path for future relitigation of the issues" and ensures that "none is prejudiced" by the preliminary decision. *Id.* at 39-40. But this Court nonetheless affirmed the judgment of the court of appeals because the United States never had asked for vacatur of the initial judgment of the district court. *Id.* at 39. "[H]aving slept on its rights," the court explained, the United States was no longer entitled to vacatur and could properly be held bound by res judicata in the second round of litigation. *Id.* at 41.

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), this Court held that vacatur is not required by *Munsingwear* in cases mooted by a voluntary *settlement* between the parties. The Court explained that vacatur is an "extraordinary remedy" that depends on "equitable entitlement," and that a party who voluntarily forgoes appellate review by settling while the case is on appeal cannot reasonably complain if the unreviewable judgment remains

on the books. *See id.* at 26. Significantly, *Bancorp* specifically stated that it "st[oo]d by *Munsingwear*'s dictum that mootness by happenstance provides sufficient reason to vacate" (*id.* at 25 n.3), while seemingly questioning "[w]hether that principle was correctly applied to the circumstances of that case." *Id.*; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (suggesting that happenstance encompasses "circumstances not attributable to the parties"). Nonetheless, the Court declined to disavow "*Munsingwear*'s implicit conclusion that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of the United States." *Bancorp*, 513 U.S. at 25 n.3.

2. There is substantial confusion among the courts of appeals regarding the application of *Munsingwear* to a case like this one, where the mootness can be attributed to actions of the appellant, but those actions were not taken to influence the litigation. Consistent with the factual scenario that this Court encountered in *Munsingwear* itself, many courts of appeals either treat that factual scenario as the type of "happenstance" that imposes a "duty" to vacate or hold that the balance of the equities generally requires vacatur in those circumstances. By departing from the consistent course of decisions in this area, the Fifth Circuit exacerbated a circuit split that warrants this Court's review.

For example, "[w]here mootness [is] caused by . . . 'happenstance' or the 'vagaries of circumstance'" the Ninth Circuit "direct[s] vacatur." *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). The Ninth Circuit treats "this general approach to vacatur as 'automatic'" for all cases where "mootness result[s] from happenstance." *Pub. Utils. Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (quoting *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995)); *see also Pub. Utils.*, 100 F.3d at 1461 (stating that "mootness resulting from happenstance . . . *does* require vacatur" (emphasis in original)). That approach—and its conflict with the Fifth Circuit's analysis in this case—is exemplified by *Dilley v. Gunn*.

In that case, Mr. Dilley claimed that the prison in which he was incarcerated failed to afford constitutionally sufficient access to a law library. The district court agreed and ordered the state to provide increased library access. *Dilley*, 64 F.3d at 1367. While the appeal was pending, the state transferred Mr. Dilley to a different facility with greater library offerings for reasons unrelated to the litigation, thereby mooting the appeal. After addressing these facts, the Ninth Circuit held, "Mootness resulting from such a transfer would be attributable to 'happenstance' within the meaning of *Munsingwear*, even if the defendants, as employees of the state's prison system, did play an administrative role in the transfer." *Id.* at 1372. A contrary rule, the Ninth Circuit noted, "might create an incentive for prison officials to hinder routine transfers . . . by inmates who have obtained favorable but not yet reviewed judgments in the district court." *Id.*

The Fifth Circuit's holding in this case also conflicts with the recent holding of the Third Circuit in *Rendell v. Rumsfeld*, 484 F.3d 236 (3d Cir. 2007). In that case, Pennsylvania Governor Edward Rendell brought an action challenging a decision by Donald Rumsfeld to recommend the deactivation of a unit of the Pennsylvania National Guard. The district court ruled against Mr. Rumsfeld, who then appealed. By the time the case reached the Third Circuit, the case had become moot because others within the federal government had decided against implementing Mr. Rumsfeld's recommendation. The Third Circuit recognized that the actions mooting the case did not result from an attempt to "manipulat[e] . . . the legal system" and were simply a product of the "vagaries of circumstance." *Id.* at 243. Accordingly, it held that *Munsingwear*'s "general rule of vacatur [was] specifically indicated." *Id.*; *cf. Khodara Envtl., Inc. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001) (Alito, J.) (recognizing that although appellant's legislative amendment was factually responsible for mooting the appeal, vacatur was proper because there was no evidence that Congress intentionally sought "to frustrate an adverse judgment").

Likewise, the District of Columbia Circuit recognizes that while *Bancorp* confirmed that "vacatur is an equitable remedy," that case "did not thereby undo the established precedential backdrop of *Munsingwear*, in which the Supreme Court affirmed that vacatur is 'the duty of the appellate court' when a case has become moot through happenstance while appeal was pending." *Columbian Rope Co. v. West*, 142 F.3d 1313, 1318 n.5 (D.C. Cir. 1998) (quoting *Munsingwear*, 340 U.S. at 40); *see also Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 634 (D.C. Cir. 2002) ("Where happenstance has made a matter moot, the standard practice is to vacate the decision of the district court.").

In *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346 (D.C. Cir. 1997), the plaintiff challenged the constitutionality of campaign contribution limits enacted by the District of Columbia. While the appeal was pending, the District of Columbia Council passed new legislation that raised the contribution limits and mooted the appeal. The D.C. Circuit acknowledged that the new legislation "[c]learly" represented "voluntary action" and therefore "the *Bancorp* presumption might seem to govern." *Id.* at 351. Yet the court held that the "application of the *Bancorp* presumption in this context is not required by the *Bancorp* opinion's rationale and would be inappropriate, at least if there is no evidence indicating that the legislation was enacted in order to overturn an unfavorable precedent." *Id.* Moreover, the court asserted that "the respect that courts owe to other organs of government" should make courts "wary of impugning the motivations" of other government actors. *Id.* at 352.[2]

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[2] Similarly, in *American Family Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625 (D.C. Cir. 1997), AFLAC's appeal became moot after AFLAC sold its interests in certain television stations. *Id.* at 628. The FCC argued that vacatur should not be ordered because "AFLAC caused th[e] dispute to become moot through its 'unilateral, voluntary action.'" *Id.* at 630. The court, however, rejected the FCC's argument because it "misinterpret[ed] *U.S. Bancorp*" (*id.*), which "concern[ed] . . . settle-

The Fourth Circuit also vacated a case mooted by the government's conduct in *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007). In that case, plaintiffs challenged the constitutionality of a wine importation and distribution law. After the district court enjoined enforcement of the law, the state legislature "virtually codified . . . portions of the district court's decision" by amending the offensive statute so as to "track almost completely the district court's order." *Id.* at 347-48. Though this enactment rendered the appeal moot, plaintiffs argued that the district court's judgment should have remained intact because the state was factually responsible for the mootness. The Fourth Circuit disagreed, described the case as one mooted by happenstance, and held that, for vacatur purposes, a "legislature's amendment of a challenged law is not 'voluntary cessation' attributable to the State's executive officials defending a challenge to that law." *Id.* at 349.

3. In contrast, the Fifth Circuit in this case refused to vacate despite finding that "the bottom-line cause of the removal was related to the ongoing renovations." App., *infra*, 10a. Instead, the Fifth Circuit claimed that vacatur should be "determined on a case-by-case basis" and not governed by "inflexible rules." *Id.* 7a. Accordingly, the Fifth Circuit based its refusal to vacate on a broad mix of factors, many of which had nothing to do with the relevant inquiry under *Munsingwear* and *Bancorp*. The factors examined by the Fifth Circuit included: (1) Ms. Staley had received favorable judgments from both the district court and court of appeals before the case was mooted; (2) the actions mooting the case were temporary; (3) the district court's judgment would (purportedly) not have a great effect on non-parties to the litigation; and (4) the County's counsel did not keep the court ap-

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[Footnote continued from previous page]

ments," and "ha[d] no application," to circumstances where AFLAC "did not sell the stations in order to moot the case." *Id.* at 630-31.

prised of the status of the renovations and how those renovations might affect the case's status. *Id.* 12a-14a.

None of those factors speaks to the relevant question, which is whether the County's attempt to appeal was "frustrated by the vagaries of circumstance." *Cf. Bancorp*, 513 U.S. at 25. By considering irrelevant "equitable factors," the true inquiry was lost. And, by refusing to vacate a case where the events that mooted the case were unrelated to the litigation, the Fifth Circuit reached a result that conflicts with decisions of this Court and of virtually every other circuit to consider the issue, although at least one other circuit also uses this flawed approach. *See, e.g., Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002) (explaining that mootness arising from voluntary actions unrelated to the litigation falls into a "gray-area" where vacatur will depend on the particular circumstances).

This Court should grant the instant petition to clarify that vacatur is required in cases mooted by an appellant's actions when those actions are unrelated to the litigation.

II. Vacatur Is Particularly Important In Cases Like This One, When An Untested Judgment Will Force The Public To Bear The Burden Of Fees And The Dead Hand Of An Erroneous Judgment Could Chill The Exercise Of First Amendment Rights.

The Fifth Circuit's refusal to vacate the district court's judgment imposes significant consequences upon the County and its citizens. These consequences flow from an erroneous judgment based on outdated case law. The three-judge panel opinion of the Fifth Circuit explained that the constitutionality of the display should be informed by this Court's decisions in *McCreary County* and *Van Orden*, and it rejected the district court's holding that the Monument violated the Establishment Clause before its 1995 rededication. *See* App., *infra*, 42a; *id.* 52a (Smith, J., dissenting). Nevertheless, the en banc Fifth Circuit refused to vacate the district court's

judgment, thereby preserving an opinion that a panel of the Fifth Circuit had largely rejected and that the entire Fifth Circuit had called into question through its grant of rehearing en banc. *Cf.* Fed. R. App. P. 35(b).

1. Aside from its preservation of suspect precedent, the ruling below also subjects the County to an award of attorneys' fees based upon a judgment that is only "preliminary" in our system of appellate review (*Munsingwear*, 340 U.S. at 40), and that the County is powerless to challenge. *Cf. Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) ("Th[e] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."). Had the County ultimately prevailed on appeal, no fees could have been awarded to the plaintiff. *See Sole v. Wyner*, 127 S. Ct. 2188, 2192 (2007); *Kentucky v. Graham*, 473 U.S. 159, 165, 170-71 (1985); *Cruz v. Town of Cicero*, 275 F.3d 579, 592 (7th Cir. 2001). Nevertheless, the Fifth Circuit treated this "preliminary" and suspect decision as if it were both final and clearly correct.

The Fifth Circuit erred by awarding attorneys' fees in this case. "Exposure of any party to [liability for his opponent's attorneys' fees] when mootness deprives him of the appeal authorized by law which he had already initiated should result only from a clear authorization by Congress or settled precedent of this Court." *Alioto v. Williams*, 450 U.S. 1012, 1013-14 (1981) (Rehnquist, J., dissenting from denial of certiorari, joined by White, J.). In this case, the Fifth Circuit's refusal to vacate directly conflicts with this Court's instructions that vacatur is "commonly utilized in *precisely this situation* to prevent a judgment, unreviewable because of mootness, from spawning *any legal consequences*." *Munsingwear*, 340 U.S. at 41 (emphases added); *see also supra* pp. 8-10. As a result of the Fifth Circuit's failure to follow *Munsingwear*, the County has "unquestionably been 'prejudiced by a decision which in the statutory scheme was only preliminary.'" *Alioto*, 450 U.S. at 1014 (Rehnquist, J., dissenting from denial of certiorari, joined by White, J.) (quoting *Munsingwear*, 340 U.S. at 40); *cf. Lewis*, 494 U.S.

at 483 ("Whether [a plaintiff] can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal is a question of some difficulty.").

The Fifth Circuit's refusal to vacate this questionable decision imposes very real consequences upon the County. The judgment—which the County will never have the full opportunity to litigate—subjects the County to an award of attorneys' fees and will impede future litigation, should the County decide to redisplay the Monument. Moreover, although the en banc majority favored leaving the judgment intact because it would have little effect on non-parties to the litigation, *see* App.,. *infra*, 14a, Judge DeMoss correctly observed that, "[t]his will come as a big surprise to millions of Harris County residents who have had a possibly constitutional public monument removed at the request of one individual." *See id.* 25a n.2 (DeMoss, J., dissenting).

2. Vacatur is particularly warranted when suspect, untested judgments will chill the exercise of activities protected by the First Amendment. As a result of this judgment, governmental authorities will likely curtail their tolerance for religious speech, for fear of being subjected to litigation, an injunction, and an order requiring the payment of attorneys' fees. This Court should grant this petition to underscore the importance of vacatur in cases where the dead hand of an erroneous judgment will chill the exercise of activities protected by the First Amendment.

This Court has consistently recognized the need for "expansive remed[ies]" where constitutionally protected speech may be chilled, *see Virginia v. Hicks*, 539 U.S. 113, 119 (2003), based on the "fundamental proposition . . . that an erroneous limitation of speech has, by hypothesis, more social disutility than an erroneous overextension of freedom of speech." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. Rev. 685, 688 (1978). The same fundamental commitment

to eliminating erroneous limitations of speech recommends automatic vacatur in cases where an unreviewed district court judgment might chill speech or conduct protected by the First Amendment. *See also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980).

Our system of federal courts relies upon appellate review of district court decisions. Professors Wright and Miller have explained that "[t]he lower courts and their procedure . . . have been designed as part of a structure in which appellate review is available." 13A Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE § 3533.10 (2d ed. 1984); *cf. Munsingwear*, 340 U.S. at 40 (characterizing a district court's decision as "preliminary" in the "statutory scheme"). Appellate review is the federal courts' error-checking mechanism, with review especially critical "to test the precedent" in difficult cases. Wright et al., *supra*, FEDERAL PRACTICE & PROCEDURE § 3533.10. An unreviewed district court judgment has a higher risk of error than one that has been tested on appeal.

In the First Amendment context, such risk is unacceptable because "the First Amendment enjoys a special status in the constitutional scheme" such that "[a]ny substantial 'chilling' of constitutionally protected expression is intolerable." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 867 (1991). The risk of error is especially high in the Establishment Clause context, where appellate review is particularly important to check a district court judgment against evolving case law. When mooted by non-strategic action, a district court judgment that enjoins the exercise of First Amendment rights should be vacated to prevent an erroneous ruling from unduly chilling protected speech.

This Court's commitments to safeguarding litigants from consequences arising from preliminary judgments and to protecting the public from undue limitations on speech and religious exercise recommend a rule of automatic vacatur for a case such as this, where an appellant's challenge to a suspect

order enjoining conduct protected by the First Amendment was mooted by events unrelated to the litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 23, 2007

APPENDIX

APPENDIX A

KAY STALEY,
Plaintiff - Appellee,

v.

HARRIS COUNTY, TEXAS,
Defendant - Appellant.

No. 04-20667

In The United States Court
Of Appeals For The Fifth Circuit

Appeals From the United States
District Court for the
Southern District of Texas

April 24, 2007, Filed

Before: JONES, Chief Judge, KING, JOLLY, HIGGINBOTHAM, DAVIS, SMITH, WIENER, BARKSDALE, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, and OWEN, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

We voted this case en banc to decide whether, in the factual context presented, the display of a Bible in a monument dedicated to a philanthropic citizen and located on the grounds of the Harris County Civil Courthouse, violates the Establishment Clause. The district court ordered the Bible removed. We decline, however, to reach the merits of this appeal. Instead, we hold that the case is moot because only days before oral argument in this en banc case, the County removed the monument from the public grounds and placed it in storage, to permit the ongoing renovation of the Courthouse and its grounds. Furthermore, it is not known when, where, or under what circumstance the monument and Bible will be restored on the Courthouse grounds. Because the case is moot, we must decide whether to vacate the district court judgment. This decision rests upon equitable principles, and we conclude that the County has not met its burden of showing that it is entitled to the equitable relief of vacatur. We therefore DISMISS the appeal and REMAND the case solely for a determination of appropriate attorneys' fees.

I.

In our panel opinion, 461 F.3d 504, we set out the history of the Mosher monument. The monument was erected on the Harris County Civil Courthouse grounds in 1956 in honor of Houstonian philanthropist William S. Mosher and was refurbished and rededicated in 1995. *See id.* at 505-07. In considering whether the display of the Bible in the monument violated the Establishment Clause, we emphasized that Establishment Clause analysis is context-specific and fact-intensive. *See id.* at 510-13. In the specific context of the refurbishment and rededication of the monument, the panel majority concluded that the display of the Bible violated the Establishment Clause and thus affirmed the district court's

judgment ordering the Bible removed. *See id.* at 513-15. The County timely petitioned for rehearing en banc, which we granted.

About two months before oral argument of this en banc case, it came to our attention that the Courthouse had closed for renovations and would likely remain closed for a few years. Accordingly, the Court asked the parties to brief these changes as they affected the "case or controversy" requirement of Article III of the U.S. Constitution.

In response, Harris County informed the Court that the monument was scheduled to be removed and placed in storage during the renovations of the Courthouse, and that the renovations would not be completed until 2009 at the earliest. On January 19, 2007, only four days before we heard oral argument as an en banc court, Harris County removed the monument and placed it in storage. Harris County specifically has asserted that it will display the monument again after the renovations are complete.

II.

The question before us is whether this appeal is moot. The district court ordered the Bible removed from the monument because it concluded that the placement of the Bible in the monument violated the Establishment Clause in the context of the facts of this case. Because the monument and Bible are no longer displayed, the County asks us to hold that the case has become moot, to dismiss the appeal, and to vacate the judgment. We review questions of mootness de novo. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 938 (2007).

Furthermore, the County emphasizes that no decision has been made regarding when, where, or under what circumstances the monument will be displayed again in the fu-

ture. According to the County, then, the monument's future is too speculative to determine whether the monument will violate the Establishment Clause in the future. This raises questions of ripeness, which we also review de novo. *Id.* In determining the constitutionality of a religious display, the Supreme Court has made clear that "under the Establishment Clause detail is key." *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867-68 (2005) (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) ("[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears") (internal quotation marks and citation omitted)).

The importance of facts and context is evident from the respective outcomes in two recent Supreme Court decisions addressing the constitutionality of Ten Commandments displays. *See McCreary,* 545 U.S. at 844; *Van Orden v. Perry,* 545 U.S. 677 (2005). In both *McCreary* and *Van Orden*, the issue before the Supreme Court was whether a Ten Commandments display violated the Establishment Clause. *See McCreary*, 545 U.S. at 850; *Van Orden*, 545 U.S. at 681. The two cases, however, involved very different facts, and based on the specific facts and context of each case, the Supreme Court upheld the display in *Van Orden* but struck down the displays in *McCreary*. *See McCreary,* 545 U.S. at 881; *Van Orden*, 545 U.S. at 692.

In *Van Orden*, the Court upheld a Ten Commandments display on the Texas State Capitol grounds. *Van Orden*, 545 U.S. at 692. In its opinion, the plurality distinguished the display from classroom Ten Commandments displays held unconstitutional in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), noting a "far more passive use of those texts than

was the case in *Stone*." *Van Orden*, 545 U.S. at 691. Similarly, in his opinion concurring in the judgment in *Van Orden*,[1] Justice Breyer emphasized the importance of specific facts: "While the Court's prior tests provide useful guideposts ... no exact formula can dictate a resolution to such fact-intensive cases." *Van Orden,* 545 U.S. at 700 (Breyer, J., concurring) (internal citations omitted). Relying on the specific facts and context surrounding the Ten Commandments display on the Texas State Capitol grounds, Justice Breyer concluded that the display in this "borderline case" did not violate the Establishment Clause and was distinguishable from other Ten Commandments displays held unconstitutional by the Supreme Court, including the displays in *McCreary*. *See id.* at 700-03.

In *McCreary*, the Court struck down Ten Commandments displays in two Kentucky county courthouses. The two counties had installed a display in their respective courthouses, and after the ACLU sued, the counties replaced them with a second set of displays. *McCreary*, 545 U.S. at 851-53. The district court ordered the second set of displays removed, and the counties installed a third set of displays, which the district court also ordered removed. *Id.* at 854-57. In its analysis, the Supreme Court looked to the purpose of the Ten Commandments displays, explaining that "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context." *Id.* at 874. The Court

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1 For the purposes of our case today, Justice Breyer's concurrence is the controlling opinion in *Van Orden*. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotations omitted)).

held the first and second displays unconstitutional based on the specific facts surrounding the displays. *Id.* at 868-70. The Court also struck down the third set of displays, and in doing so, the Court looked to the displays' historical contexts and evaluated them in the light of the first and second sets of displays. *Id.* at 871-72.

In this light, we see that this appeal is moot. Staley, an attorney, claimed Article III standing because she passed the monument going to and from the Courthouse in the course of her occupation. Out of sight in some warehouse, the monument no longer raises the potential Establishment Clause violations that offended Staley. It follows that the appeal is no longer required either to establish or to protect Staley's First Amendment rights. *See, e.g., Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998) ("we find it beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined").

Additionally, any dispute over a probable redisplay of the Mosher monument is not ripe because there are no facts before us to determine whether such a redisplay might violate the Establishment Clause. Indeed, no decision has been made regarding any aspect of the future display of the monument. In the absence of this evidence, we are unable to conduct the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*. Thus, any claim that the Establishment Clause may be violated after the Courthouse and grounds have been renovated, is not ripe for review. *See United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) ("A claim is not ripe for review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (citing *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted))).

III.

A.

Having concluded that this appeal is moot, we must now decide whether to vacate the district court judgment. In deciding whether to vacate, we first turn to the decisions of the Supreme Court. As reflected in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), historically, the established rule was to vacate the judgment if the case became moot on appeal. *Id.* at 39; *see also Duke Power Co. v. Greenwood County, S.C.*, 299 U.S. 259, 267 (1936). In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), however, the Supreme Court rejected the longstanding rule reflected in *Munsingwear*, *see id.* at 23-24.

In *U.S. Bancorp*, the Supreme Court stepped back from the "automatic" vacatur that almost invariably had followed a finding of mootness on appeal. *See id.* The Ninth Circuit had held that a mortgagor could not proceed with a foreclosure sale because the mortgagee had filed for bankruptcy. *Id.* at 20. Once the case was before the Supreme Court, the parties settled and thus mooted the case. *Id.* The mortgagor, *U.S. Bancorp*, then asked the Supreme Court to vacate the decision of the Ninth Circuit. *Id.* In contemplating whether to vacate, the Supreme Court took the occasion to examine anew the general principles governing questions of vacatur. Reviewing its precedents, the Supreme Court observed: "From the beginning we have disposed of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (internal quotations and citations omitted). The Supreme Court made clear and emphasized that vacatur is an "extraordinary" and equitable remedy, *see id.* at 25-26; thus, vacatur is to be determined on a case-by-case basis, governed by facts and not inflexible rules. In weighing the equities, the Supreme Court noted from its

precedents "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *See id.* at 24. Thus, for example, "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.* at 23. Furthermore, "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25. In response to an argument that both parties agreed to the settlement and therefore both parties were "jointly responsible," the Supreme Court clarified that the burden is on "the party seeking relief from the status quo" of the lower court judgment to demonstrate "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26 (emphasis added). As a component in determining the grant of equitable relief, the Supreme Court also acknowledged the public interest, e.g., whether vacatur might be abused by the losing party to advance a legal position rejected by the lower court. *See id.* at 26-27. In the light of these general equitable principles, the Supreme Court ultimately denied vacatur to U.S. Bancorp because a party settling a case has "voluntarily forfeited his legal remedy" of vacatur. *See id.* at 25.

Three years after its decision in *U.S. Bancorp*, the Supreme Court decided *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and, applying the equitable principles articulated in *U.S. Bancorp*, concluded that vacatur was "the equitable solution." *Arizonans*, 520 U.S. at 75. In *Arizonans*, the plaintiff prevailed in the district court, but while the case was on appeal, she resigned from her public sector employment and mooted the case. *Id.* at 72. The case thus mooted by her voluntary actions unrelated to the litigation, the plaintiff then asked the Supreme Court to leave the district court judgment in place. *See id.* at 74. Notwithstanding that the case had been mooted by her voluntary actions unre-

lated to the litigation, the Supreme Court rejected her request and, without raising the question of whether the plaintiff intended her actions to moot the case, concluded that "the 'exceptional circumstances' that abound in this case," coupled with a federalism concern, warranted vacatur. *See id.* at 75 (quoting *U.S. Bancorp*, 513 U.S. at 29). Thus, in *Arizonans*, the Supreme Court decided, on equitable grounds, the question of vacatur against the party voluntarily causing mootness. *See id.* Since *Arizonans*, the Supreme Court does not appear to have spoken on the issue of vacatur.[2]

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2 Since *U.S. Bancorp* and *Arizonans*, our Court has decided questions of vacatur not inconsistent with the equitable principles in *U.S. Bancorp*. For example, in cases mooted by actions that were clearly unattributable to the voluntary actions of the parties, we have consistently vacated. *See Murphy v. Fort Worth Independent School District*, 334 F.3d 470, 471 (5th Cir. 2003) (per curiam) (vacating because the appellee's graduation was "happenstance" and not "the voluntary action of the losing party"); *AT&T Commc'ns of the Sw., Inc. v. City of Dallas, Tex.*, 243 F.3d 928, 930-31 (5th Cir. 2001) (vacating because the case was mooted by enactment of a state statute and repeal of a city ordinance, not the "voluntary action" of the appellant); *AT&T Commc'ns of the Sw., Inc. v. City of Austin*, 235 F.3d 241, 244 (5th Cir. 2000) (vacating because the case was mooted by enactment of a state statute, not the "voluntary action" of the appellant); *Pederson v. La. State Univ.*, 213 F.3d 858, 883 (5th Cir. 2000) (vacating because the appellee university was "frustrated by the vagaries of circumstance", that is, by the appellant's graduation). Similarly, in cases mooted by the voluntary actions or inactions of a party, we have decided the vacatur question in favor of the party that did not cause the case to become moot. *See Goldin v. Bartholow*, 166 F.3d 710, 718-22 (5th Cir. 1999) (vacating because appellees caused the mootness by failing to substitute the proper defendant); *Sierra Club v. Glickman*, 156 F.3d 606, 620 (5th Cir. 1998) (refusing to vacate because the appellant mooted the case by voluntarily complying with the district court's judgment); *Harris*, 151 F.3d at 189-91 (vacating the district court judgment after the appellee city mooted the case by completing the proposed annexation). Nevertheless, even though these cases stand for the proposition that the party causing mootness does not get the benefit of the judgment below,

B.

Thus, in the light of the above, we now turn to consider whether Harris County has met its burden of demonstrating an "equitable entitlement to the extraordinary remedy of vacatur." *See U.S. Bancorp*, 513 U.S. at 26. Here, it is clear that Harris County caused this case to become moot by voluntarily removing the monument. Although the timing of the removal may be open to question, we acknowledge that the bottom-line cause of the removal was related to the ongoing renovations. Against this background, the County's basic argument is that its voluntary removal of the monument was unrelated to the case and was not done with the intent of mooting the case. Therefore, according to the County, the mootness occurred by mere "happenstance", and it is entitled to vacatur as the usual default remedy under *Munsingwear*.

As discussed above, the Supreme Court rejected the uniform rule reflected in *Munsingwear* when it decided *U.S. Bancorp*. *See* 513 U.S. at 23-24. It is *U.S. Bancorp*, not the earlier case of *Munsingwear*, that controls our decision today, and, as we have indicated, *U.S. Bancorp* requires that we look at the equities of the individual case. *See id.* at 25-26.

Nevertheless, it is true that the mootness in *U.S. Bancorp* arose out of the litigation itself (settlement of the case) and it might be said that the losing party intended to moot the case by settling it. Among the post-*U.S. Bancorp* cases, the best support for the County's position seems to be *Russman v.*

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none of these cases speak directly to the facts before us today, and as we have indicated, *U.S. Bancorp* requires that we determine vacatur after examining the equities of this case. *See U.S. Bancorp*, 513 U.S. at 25-26.

Board of Education, 260 F.3d 114 (2d Cir. 2001).[3] In *Russman*, the Second Circuit acknowledged that under *U.S. Bancorp*, vacatur "depends on the equities of the case," and the "primary concern is the fault of the parties in causing the appeal to become moot." *Id.* at 121. In *Russman*, the school prevailed in the district court; the plaintiff-appellant student, Russman, then voluntarily withdrew from the school and thus mooted the case while on appeal. *Id.* at 118-19. The Second Circuit acknowledged that, generally, "where the appellant has caused the mootness, we may dismiss the appeal without vacating the district court's judgment." *Id.* at 122. Notwithstanding this general rule, the Second Circuit followed a different approach in *Russman* (the "*Russman* approach") to the remedy of vacatur: "However, we believe conduct that is voluntary in the sense of being non-accidental, but which is entirely unrelated to the lawsuit, should not preclude our vacating the decision below." *Id.* (emphasis added). The Second Circuit went on to vacate the district court judgment. *Id.* at 123.

We note, however, that even under the *Russman* approach, the language "should not preclude" does not set out a hard and fast rule; there is no language in *Russman* that bars other equitable considerations -- if they happen to be present -- in fashioning a remedy for mootness. We further note that the Supreme Court has never required, or even suggested, such an approach although it has had ample opportunity to do so. Whether a party's voluntary conduct was not done with specific intent to moot the case is certainly one factor we may consider, but the absence of such specific intent does not outweigh other equitable factors.

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3 *See also Khodara Envtl., Inc. v. Beckman*, 237 F.3d 186 (3d Cir. 2001); *Nat'l Black Police Assoc. v. Dist. of Columbia*, 108 F.3d 346 (D.C. Cir. 1997); *Dilley v. Gunn*, 64 F.3d 1365 (9th Cir. 1995).

Here, for example, three equitable factors distinguish this case from *Russman*, and indeed, from the other cases that have applied the *Russman* approach, *see Khodara Envtl.*, 237 F.3d at 195; *Nat'l Black Police Assoc.*, 108 F.3d at 351-54; *cf. Dilley*, 64 F.3d at 1370-71 (remanding). First, in none of those cases did a party obtain full relief in the district court, and on appeal, before the opposing party took actions mooting the case. Second, in none of those cases did a party assert outright that its actions mooting the case were only temporary. And third, in those cases, the district court judgment had a greater effect on non-parties to the litigation. *See Russman*, 260 F.3d at 118 (district court held that the U.S. Constitution and New York law do not require on-site special education services at private parochial school); *Khodara Envtl.*, 237 F.3d at 191-92 (district court held federal statute facially unconstitutional); *Nat'l Black Police Assoc.*, 108 F.3d at 348 (district court held initiative limiting campaign contributions unconstitutional and enjoined enforcement); *Dilley*, 64 F.3d at 1367 (district court held that prison failed to provide inmates with constitutionally adequate access to the law library and ordered changes in the library's policies). Here, in contrast, this case is fact and party specific.[4]

C.

Having considered the arguments favoring the County, we now turn to the equities in favor of preserving the district court judgment. Here, Staley prevailed not only in the dis-

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4 Given these differences, the equities in the decisions of our sister circuits are different from the equities in this case. Accordingly, we are not creating a circuit split because, like the decisions of our sister circuits, we are deciding this case based on the facts and the equities before us.

trict court but also before a panel of this Court.[5] Should we vacate, Staley will be denied her judgment, not because her claim lacked merit, nor because of her choices or acts, but for the reason that Harris County, by its "last-minute" voluntary acts, removed (temporarily) the monument from public viewing.

In weighing the equitable considerations in this case, we also consider the County's conduct in the course of mooting the case. Here, not only did the County's voluntary actions cause this case to become moot, but, more importantly, the County has pledged to display the monument again after the renovations. Additionally, although the County was well aware of the renovations ever since the Harris County Commissioners Court approved the "Master Preservation Plan" in February 2004, it has failed to keep the courts updated on the status of the renovations or to suggest mootness until we raised the question. In fact, the County never apprised the courts that renovations could have a possible impact on this litigation. Instead, it was Staley's attorney who raised the matter at trial when he asked Harris County Judge Robert Eckels on direct examination whether the monument would be removed; Judge Eckels replied that the plans were not well-enough developed to answer the question. After trial, as many months passed, the case proceeded to appeal in this Court, through the panel, the en banc petitions, and the en banc vote without the County ever having suggested that the monument -- the center of the litigation -- could be removed at any time, ending the controversy, even though "[i]t is the duty of counsel to bring to [our] attention, 'without delay,'

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5 Of course, here, only the district court judgment survives. When the Court voted the case en banc, the panel opinion was automatically abrogated. *See Freeman v. Tex. Dept. of Criminal Justice*, 369 F.3d 854, 864 n.12 (5th Cir. 2004).

facts that may raise a question of mootness." *See Arizonans*, 520 U.S. at 68 n.23. When we raised the issue, Harris County proceeded on its own volition to remove the monument only days before oral argument, and now it seeks advantage of its conduct, asking us to hold the case moot and vacate the district court judgment against it. The totality of this conduct does not support the County's obligation to demonstrate an "equitable entitlement to the extraordinary remedy of vacatur." *See U.S. Bancorp*, 513 U.S. at 26.

Finally, the County has not shown how the public interests weigh in its favor. *See id.* at 27 (considering the public interests). Indeed, the preservation of the district court judgment serves the judicial and community interests by discouraging relitigation of the identical issues by the same parties under the same circumstances. Of course, whether any future case involving the Mosher monument is proscribed by the district court judgment and injunction will depend on its own facts and circumstances, and that question, if it arises, will fall within the determination of the district court in the first instance.

D.

Weighing the equities before us, we dispose of this case "in the manner most consonant to justice," *see U.S. Bancorp*, 513 U.S. at 24, and conclude that Harris County has not carried its burden of demonstrating an "equitable entitlement to the extraordinary remedy of vacatur," *see id.* at 26. Balancing the relevant considerations and considering the totality of the equities, we leave the district court judgment in place.[6]

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6 As to Judge DeMoss's suggestion to the district court that it consider modifying its injunction on remand, *see* ___ F.3d at ___ (DeMoss, J., dissenting), we emphasize that "[o]rdinarily, the purpose of a motion to modify an injunction is to demonstrate that changed circumstances make

IV.

The final and separate question before us is the question of attorneys' fees. "[A] determination of mootness neither precludes nor is precluded by an award of attorneys' fees. The attorneys' fees question turns instead on a wholly independent consideration: whether plaintiff is a 'prevailing party.'" *Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir. 1980). To qualify as a prevailing party, "[a]ll that is required is that the plaintiff obtain the primary relief sought." *Id.*[7]

Given our opinion today, Staley has obtained the primary relief she sought and therefore remains the prevailing party. *See id.* As a prevailing party, she is entitled to appropriate attorneys' fees. *See id.*

V.

Because the Mosher monument has been placed in storage indefinitely and is no longer available for public viewing, the appeal is DISMISSED as moot. We decline to vacate the district court's judgment, and we REMAND the case to the district court solely for a determination of appropriate attorneys' fees for Staley.

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the continuation of the order inequitable." *ICEE Distrib., Inc. v. J & J Snack Foods Corp.*, 445 F.3d 841, 850 (5th Cir. 2006) (quoting *Black Assoc. of New Orleans Fire Fighters v. City of New Orleans, La.*, 853 F.2d 347, 354 (5th Cir. 1988)). Here, changed circumstances do not render the district court's injunction "inequitable." *See id.*

7 The Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), does not preclude attorney's fees in this case because Staley, unlike the plaintiffs in *Buckhannon Board*, prevailed in the district court, *see id.* at 600-02.

DISMISSED and REMANDED.

EMILIO M. GARZA, Circuit Judge, with whom EDITH BROWN CLEMENT and PRISCILLA R. OWEN, Circuit Judges, join, dissenting:

Because I disagree with the majority's determination that this case is moot on the present record, I respectfully dissent.

If this case is moot, it is because -- as the majority recognizes -- "Harris County, by its 'last-minute' voluntary acts, [has] removed (temporarily) the monument from public viewing." What the majority wholly ignores, however, is the well-settled rule "that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Otherwise, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Id.* (quoting *City of Mesquite*, 455 U.S. at 289 n.10). Accordingly, "the standard . . . for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)). The party asserting mootness -- in this case Harris County[1] -- bears the

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[1] As the majority points out, upon learning that the Courthouse had closed for renovations and would likely remain closed for a few years, this Court asked the parties to brief that change of circumstances as it pertained to issues stemming from Article III's case or controversy requirement, including but not limited to standing and mootness. In re-

"'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.*

Despite the majority's assertion to the contrary, it is not at all clear that Harris County's voluntary removal of the monument caused this case to become moot. Rather, Harris County's placement of the monument in storage pending completion of the Courthouse renovations mooted this case only if that act made it absolutely clear that the Establishment Clause violation alleged to have occurred in this case could not reasonably be expected to recur. *Id.* at 193. This is a disputed factual matter, as to which no record has been developed because the issue of mootness was raised for the first time by this Court. Although Harris County asserts in its appellate brief that the redesign of the Courthouse will make it a "physical impossibility" to return the monument to its precise former location, such an assertion is not sufficient to satisfy the heavy burden of persuasion borne by Harris County, particularly since Harris County has made clear its intention to redisplay the monument once the renovations are complete. *See Concentrated Phosphate Exp. Ass'n,* 393 U.S. at 203 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004). Without any factual development on the nature and extent of the Courthouse renovations and what, if any, lasting impact they will have on the monument, it cannot "be said with assurance that there is no reasonable expectation that the alleged violation will recur" or that Harris County's recent

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sponse, Harris County took the position in its brief and at oral argument that changed circumstances mooted the case because the monument was being placed in storage until the renovations were completed. Thus, Harris County is the party asserting mootness in this case.

actions "have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks and citations omitted).[2] I would therefore remand this case to the district court for factfinding on these issues and for an initial mootness determination.

HAROLD R. DEMOSS, JR., Circuit Judge, with whom JERRY E. SMITH, Circuit Judge, joins, dissenting in part:

I concur in the majority's conclusion that this case is moot. However, because I believe that vacatur of the district court's judgment and permanent injunction is appropriate, I respectfully dissent in part.

Properly framed, the question is whether vacatur is appropriate when voluntary action taken by an appellant moots a case, *but the action taken is completely unrelated to the litigation*. The question should be answered in the affirmative.

Admittedly, the few vacatur rules given to us by the Supreme Court do not directly answer the question, and our Court has not yet squarely addressed it. However, every other circuit court to address the issue has determined that vacatur is appropriate under such circumstances.

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[2] Indeed, the majority's discussion of the equities that favor keeping the district court's judgment in place -- which emphasizes that Harris County's removal of the monument is only temporary and that preserving the lower court judgment will serve to discourage the parties from relitigating "the identical issues . . . under the same circumstances in the future" -- only highlights the fact that we cannot be assured without an underlying record that Harris County will not resume its allegedly unconstitutional conduct.

For example, in *Russman v. Board of Education*, the Second Circuit was forced to decide whether vacatur was warranted after the plaintiff-appellant student voluntarily withdrew from school, thereby mooting the case between her and the defendant-appellee school board. 260 F.3d 114, 117-18 (2d Cir. 2001). The student's reason for leaving school was preplanned and unrelated to the lawsuit. *Id.* at 123. In determining that vacatur was appropriate, the court provided and explained all of the rules and reasoning that our Court needs to answer the question in this case. Because the *Russman* court so eloquently stated its position, below I quote from large portions of the opinion.

The court began with the basic rules of a vacatur:

> In general, where the appellee has caused the case to become moot, we vacate . . . . On the other hand, where the appellant has caused the mootness, we may dismiss the appeal without vacating the district court's judgment.

Id. at 121-22 (citations omitted).

The court went on to explain the rationale behind the general rules:

> If we were to vacate where the party that lost in the district court has taken action to moot the controversy, the result would be to allow that party to eliminate its loss without an appeal and to deprive the winning party of the judicial protection it has fairly won.

Id. at 122 (citations omitted).

Then, the court applied that understanding to the narrow question presented, the same question we are presented with in this case:

> [N]ot all actions taken by an appellant that cause mootness necessarily bar vacatur of the district court's judgment. For an appellant's conduct to constitute "forfeiture" of the benefit of vacatur . . . we believe [the appellant] must have intended that the appeal become moot, either in the sense that mootness was his purpose or that he knew or should have known that his conduct was substantially likely to moot the appeal. Accordingly, an appellant's conduct that is undertaken with an intent to escape the collateral consequences of the decision below may defeat vacatur . . . . Similarly, if the appellant's conduct of the litigation itself causes mootness, such as where he settles the case or fails to prosecute the appeal, the appellant must know that the appeal will be mooted and thus vacatur will usually be inappropriate.

Id. at 122-23 (citations omitted).

Finally, the court crafted the precise rule, a rule we should adopt:

> [C]onduct that is voluntary in the sense of being non-accidental, *but which is entirely unrelated to the lawsuit*, should not preclude our vacating the decision below.

Id. at 23 (emphasis added) (citations omitted).

This rule has been adopted by every other circuit that has addressed this precise issue. *Khodara Envtl., Inc. v. Beckman,* 237 F.3d 186, 195 (3d Cir. 2001) (Alito, J.) (vacating the district court's judgment because the appellant's voluntary action that mooted the case was not taken "to overturn an unfavorable precedent," but rather was taken for "reasons totally independent of the pending lawsuit"); *Nat. Black Police Ass'n v. Dist. of Columbia,* 108 F.3d 346, 351-52 (D.C. Cir. 1997) (vacating because the appellant's actions were not taken for the manipulative purpose of mooting the case; rather, they were taken for reasons unrelated to the lawsuit); *Dilley v. Gunn,* 64 F.3d 1365, 1372 (9th Cir. 1995) (remanding a moot case to the district court with instructions to vacate unless the court found that appellant's action was voluntary and related to the lawsuit).

Applying the rationale of every circuit court to address the issue, it is clear that in this case vacatur of the district court's judgment and injunction is appropriate. It cannot reasonably be said that Harris County's refurbishment of the Old Civil Courts Building, an action that is voluntary only in the sense that it is non-accidental, is in any way related to this litigation. In fact, the decision to close and refurbish the building was made years before Staley's filing of this lawsuit, and would have occurred even if this lawsuit was never commenced.[1] Therefore, the refurbishment of the building, an action completely unrelated to this litigation, indirectly mooted this case. Under such circumstances, our well-established practice of vacating judgments and remedies in moot cases should control.

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1 The Old Civil Courts Building closed on April 28, 2006, and the new courthouse opened the following Monday, on May 1, 2006.

No other relevant factor suggests that we should leave in place the district court's judgment and injunction. Indeed, although the majority states that its decision is based on its balancing of the equities in this case, it cites no *relevant* factors that weigh in favor of not vacating.[2] For example, in

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[2] Although the majority states that three equitable factors unique to this case weigh in favor of not vacating, those novel factors are unpersuasive because they are either irrelevant, factually inaccurate or based on a faulty premise.

First, the majority relies on Staley's "temporary victory" before the original three-judge panel of this Court. I fail to see the relevance of this alleged factor. Harris County timely petitioned for rehearing. A majority of this en banc Court agreed that the Establishment Clause issue warranted rehearing before the entire Court. Simply put, the decision to rehear the case abrogated the panel's decision, and it matters not whether that decision was made in Staley's favor. In our legal reality, the panel decision no longer exists (except, of course, for very limited purposes such as explaining the procedural history of the case or the parties' arguments throughout the litigation). Indeed, this en banc Court *has not* spoken on the merits of the district court's decision or the original panel's decision. Thus, to the extent that the majority implies that Staley has some sort of an equitable interest in the judgment and remedy, it is mistaken. Of course, the majority's implication is somewhat of a self-fulfilling prophecy: Staley has an interest in the judgment and remedy because the majority has not vacated them; had it vacated them, she would have no such interest in them.

Second, the majority concludes that not vacating is equitable because Harris County has stated that its removal of the monument is only temporary. To start, this factor is relevant only if it is presumed that redisplaying the monument is unconstitutional. This is a faulty premise, however, because this Court has not addressed the constitutionality of the monument. More importantly, this factor is based on a factual inaccuracy. Harris County stated in its brief and at oral argument that the *possibility* existed that it would redisplay the monument. It is also possible, however, that Harris County will not redisplay the monument. It is also possible that Harris County will redisplay the monument, but in a different

some cases it can be argued that a factor weighing against vacatur is the theory that judicial precedents are presumptively valid and helpful to the legal community; therefore, even in moot cases, they sometimes should be left in tact. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship,* 513 U.S. 18, 26 (1994). That theory is not applicable here. First, the theory was not intended to apply to district court precedent, which merely is persuasive and is not binding on other courts. *See Russman*, 260 F.3d at 122 n.2.[3]

Furthermore, and more importantly here, the district court's judgment and injunction in this case, which were based on Supreme Court Establishment Clause jurisprudence,

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location or different context. The possibilities are endless, and not nearly as predicable as the majority states. In any event, contrary to the majority's assertion, Harris County has not stated that the monument *will be* redisplayed at all.

Finally, the majority contends that equity favors not vacating because the district court's judgment and remedy in this case have little effect on non-parties to this litigation. This will come as a big surprise to millions of Harris County residents who have had a possibly constitutional public monument removed at the request of one individual. I am confident most readers will immediately see the fallacy in the contention that the parties in a religious display case are the only ones affected by its outcome. Perhaps this contention is rooted in the majority's apparent presupposition that the monument is unconstitutional even though we have not reached the issue.

3 Moreover, the Supreme Court noted several times that its holding in *U.S. Bancorp* is strictly limited to the proposition "that mootness by reason of settlement does not justify vacatur . . . ." *U.S. Bancorp*, 513 U.S. at 29 (emphasis added). "[T]he case before us involves only a motion to vacate, by reason of settlement. . . ." *Id.* at 28 (emphasis added). The case before us involves mootness by reason of a preplanned renovation project, not voluntary settlement.

are of practically no precedential value to anyone because they preceded the Supreme Court's decisions in *Van Orden* and *McCreary County*. Without question, these two cases are now the starting point of any religious display analysis. (The original panel opinions in this case, which of course were vacated by our grant of en banc reconsideration on November 17, 2006, focused almost entirely on *Van Orden* and *McCreary County*.) Therefore, the district court's judgment and the injunction that followed were based on precedent that is certainly outdated and perhaps completely irrelevant. There is absolutely no equity in leaving intact an opinion, judgment or remedy that is based on superseded precedent. Therefore, this factor actually favors vacatur.

Similarly, as I mentioned previously, the majority's decision to not vacate is contrary to the decisions by other circuits to vacate under similar circumstances. There is no equity in creating a circuit split to leave in place the judgment and remedy in this case; our usual course is to avoid such splits if at all possible.

I recognize that a majority of this Court somehow finds that the equities favor not vacating. Of course, this holding does not preclude Harris County from petitioning the district court for a modification of its injunction. "Modification of an injunction is appropriate when the legal or factual circumstances justifying the injunction have changed." *ICEE Distribs., Inc. v. J&J Snack Foods, Corp.*, 445 F.3d 841, 850 (5th Cir. 2006) (Jolly, J.). Given the significant factual changes that have occurred since the injunction was entered, including the closure, continued vacancy, and plan to renovate the Old Civil Courts Building, in addition to the removal of the Mosher monument, a request by Harris County for the district court to modify the injunction clearly would be appropriate. In addition, the Supreme Court's (supposed) clarification of the Establishment Clause in *McCreary County* and *Van Orden*, discussed *supra*, may also provide a basis

for the district court to revisit the continuing propriety of the injunction.

I would vacate the judgment and injunction entered below, but recognizing that a majority of this Court disagrees, I simply note that there exists a strong basis for modification.

APPENDIX B

KAY STALEY,
Plaintiff-Appellee,

v.

HARRIS COUNTY, TEXAS,
Defendant-Appellant.

No. 04-20667

In The United States Court
Of Appeals For The Fifth Circuit

Appeals From the United States
District Court for the
Southern District of Texas

August 15, 2006, Filed

Before JOLLY, HIGGINBOTHAM, and SMITH, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal raises questions about the constitutionality of a monument, dedicated to a local citizen, located on the grounds of the Harris County Civil Courthouse. The rub is that the monument contains an open Bible. The Plaintiff, Kay Staley, an atheist, argues that the monument violates the Establishment Clause, because its primary purpose and effect are religious. Harris County argues that its purpose and ef-

fect are secular -- to memorialize the life of a worthy citizen whose contributions to the community reflect his Christian principles. We hold that although the monument at one time may have passed constitutional scrutiny, its recent history would force an objective observer to conclude that it is a religious symbol of a particular faith, located on public grounds -- public grounds that may not reflect preference in matters of religion under the Establishment Clause of the First Amendment of the United States Constitution as interpreted and applied by modern day jurisprudence. We therefore affirm the district court's judgment.

I

The Courthouse was built in 1910 and is owned and operated by Harris County, Texas, a political subdivision of the State of Texas.[1] The Courthouse occupies the center of an entire city block in an area of downtown Houston that contains many other county government buildings. Although it originally housed all county and state courts and county government offices, the Courthouse is currently designated as a Civil Courthouse, housing eighteen courts, plus the county and district clerks' offices.

In 1953, the Star of Hope Mission ("Star of Hope"), a local Christian charity that provides food and shelter to indigents, decided to build a memorial to William S. Mosher ("Mosher"), a prominent Houston businessman and philanthropist who had been a long-time, active supporter of Star of Hope before his death in 1948. Carloss Morris ("Morris"), the president of the Star of Hope Mission in 1953, approached the Harris County Commissioners Court and se-

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1 This recitation of the facts is taken largely from the district court's opinion.

cured permission to erect a memorial to Mosher on the Courthouse property. Morris testified that Star of Hope selected a location in front of the Courthouse because of the permanence and prominence of its location.

Star of Hope designed and paid for the Mosher monument. It was erected in 1956 in a plaza twenty-one feet from the main entrance to the Courthouse. The monument measures two feet, six inches by three feet, and is four feet, five inches high. Engraved on the front surface of the monument, and occupying most of the front surface's area, is the following inscription:

STAR OF HOPE
MISSION

ERECTED
IN LOVING MEMORY
OF
HUSBAND AND FATHER

WILLIAM S. MOSHER

A.D. 1956

The top part of the monument is a glass-topped display case that is sloped towards the Courthouse entrance. Star of Hope placed an open Bible in the glass display case to memorialize Mosher's Christian faith, although the monument contains no written explanation for the presence of the Bible.[2] The slop-

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2 Morris testified that one of Star of Hope's purposes for including the open Bible in the display was to convey to the public that Mosher was "a godly man" who had helped others, thus the Bible in the display case was intended to represent Mosher's Christianity. Morris also testified that the

ing top of the monument has the appearance of a lectern. The display case does not contain any other items. The monument was dedicated in 1956 in a public ceremony, which included Christian prayers.

Because the monument faces the main entrance to the Courthouse, it is readily visible to attorneys, litigants, jurors, witnesses, and other visitors to the Courthouse. However, a passerby would have to walk up to the monument to observe that it contains a Bible and would have to stand in front of it to read the Bible. The open Bible as displayed measures twelve by sixteen inches. The area in which the monument is located contains two wall plaques and two free-standing historical markers. Neither the plaques nor the historical markers contain any religious message. No other open books are displayed in or near the Courthouse. Other monuments, markers, and plaques are present in and near other county buildings, but none of them contain a religious message.

Star of Hope maintained the monument from 1956 to 1995. The monument was vandalized several times and the Bible stolen. Star of Hope replaced it each time. In 1988, atheists complained about the Bible to the Harris County Commissioners Court and asked that it be removed. Although the evidence on this point is not entirely clear, it appears that Star of Hope decided either to remove the Bible or not to replace it again, rather than face potentially costly litigation. From 1988 to 1995, the top of the monument remained open and empty, and it was often used as a trash bin.

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presence of the Bible conveys to people that this is a Christian government.

This state desuetude ended in 1995, when John Devine was elected as a state district judge. Judge Devine campaigned on a platform of putting Christianity back into government. As a judge, he initially maintained his office in a county building near the Courthouse, and later moved to the Courthouse. His official court reporter was Karen Friend. In 1995, Judge Devine and Friend initiated a project to solicit private donations to refurbish the monument, to restore a Bible to the display case, and to add neon lighting to the display case. Judge Devine obtained approval from Harris County, and made improvements to the monument, including the new Bible and a red neon light outlining the Bible. Harris County, however, did not pay for any of the improvements. A ceremony was held on the Courthouse grounds in November 1995 to commemorate the refurbishing of the monument and the replacement of the Bible. A number of Christian ministers led prayers at the rededication ceremony. Spectators and participants sang "The Battle Hymn of the Republic".

In 1996, and again in 1998, Friend paid for repairs to the lights in the display case and to the display case to protect the Bible from moisture. Since 1995, Harris County has paid for electricity at the cost of $93.16 per year to illuminate the neon lights that were installed in 1995. For a few years after the monument was refurbished, Friend periodically turned the pages of the Bible to selected passages. Since 1997, Star of Hope has maintained the monument and turned the pages of the Bible. Although Harris County does not maintain the monument, it retains the authority to move or alter it.

Staley is a resident and taxpayer of Harris County. Staley, an attorney, passes the monument going to and from the Courthouse in the course of her occupation. She testified that she is offended by the Bible display in the monument because it advances Christianity and it sends a message to her and to non-Christians that, because they do not share the

Christian faith, they are not full members of the Houston political community.

After Staley filed suit asking that Harris County be ordered to remove the Bible display, supporters of the Bible display held a large rally on September 4, 2003, in the Courthouse plaza next to the monument. Several hundred rally participants prayed and stressed that the Bible was a foundation of the Christian faith.[3] County Judge Robert Eckels, Judge Devine, and Harris County Attorney Mike Stafford spoke at the rally and participated in the prayers led by Christian ministers.[4] Eckels and Stafford stated that the County would strongly oppose the lawsuit.[5]

II

On August 25, 2003, Staley filed suit in the United States District Court for the Southern District of Texas, requesting a temporary restraining order, preliminary injunction, and permanent injunction against Harris County to remove the Bible from the display case, as well as requesting attorney's fees. On August 10, 2004, the district court entered a final judgment in favor of Staley, ordering the Bible

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3 News footage of the rally, in which the monument is referred to as the "Bible monument," contains one woman stating that she is ready to die for this, because it is the "essence of Christianity." Further, a granddaughter of Mosher stated that this was more than a battle over a monument, but was a "real battle of good and evil."

4 In the 2004 bench trial, Eckels testified that Mosher's death was "within the last few years." Judge Devine testified that he was not sure when Mosher died, but guessed 1955. Judge Devine also testified as to a nebulous understanding of what Mosher did.

5 We think this event should have little weight in determining the purpose of the monument since it was largely invited by the lawsuit and was an expected response by adversaries.

removed from the monument, as well as ordering Harris County to pay Staley $40,586 in attorney's fees and expenses. The district court reasoned that the purpose and the effect of the Bible in the monument casing were religious, thus the presence of the Bible violated the Establishment Clause. Harris County timely appeals the district court's decision.

III

Harris County maintains that the district court erred in its determination that the monument violates the Establishment Clause. First, Harris County argues that the district court erred in focusing on the Bible as a separate object apart from the Mosher memorial in which it is housed. Second, Harris County asserts that the district court erred in finding that the monument had a religious purpose. The county maintains that the purpose of the monument is to honor Mosher and the life that he led. Third, Harris County contends that the district court erred in finding that the monument had a religious effect. It insists that, due to the monument's nonreligious inscription memorializing Mr. Mosher, the reasonable observer would recognize that Star of Hope erected the monument as a private expression and that Harris County did not endorse the included Bible. We need not address Harris County's first and third arguments because we find that the monument as a whole has a predominantly religious purpose, thus running afoul of the Establishment Clause.

IV

A

This Court reviews the district court's grant of a permanent injunction under the abuse of discretion standard. *Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995). We review findings of fact for

clear error and conclusions of law de novo. *Id.* The district court's conclusions of constitutional law are reviewed de novo. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1213 (5th Cir. 1991).

To decide the case before us, we see little need to conduct an exhaustive and analytical survey of Establishment Clause jurisprudence over the past fifty, or even the past five, years. The outcome of this case is foretold by the two most recent cases handed down by the Supreme Court in this area of the law, each case dealing with monuments on public grounds, and neither case decided when the district court ruled on this case.[6] *See McCreary County, Ky. v. ACLU of Ky.*, -- U.S. --, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, -- U.S. --, 125 S. Ct. 2854 (2005).

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6 Each of these opinions suggests a constitutional determination on the basis of the conclusion of an "objective observer," and *McCreary County* involves the "purpose" test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). We recognize the criticisms of *Lemon* noted by Justice Scalia, and in particular his criticisms of the "objective observer" analysis for determining the purpose of the monument. *See McCreary County, Ky. v. ACLU of Ky.*, -- U.S. --, 125 S. Ct. 2722, 2757 (2005) (Scalia, J., dissenting). Nevertheless, this reasoning is the lodestar illuminating the pathway through the majority opinion in *McCreary County*, as well as the theme implicit in Justice Breyer's concurrence in *Van Orden*. Neither leaves any doubt that if the objective observer should conclude from appearances and historic knowledge that the state is demonstrating a religious preference, the Establishment Clause is violated.

We do not argue that our analysis, following the Supreme Court's guide, represents the most scholarly, historical, or convincing method of explaining and applying the Establishment Clause. Nevertheless, the "objective observer" analysis is both the simple and Supreme Court-approved method of deciding this case: A monument attacked under the Establishment Clause will not pass constitutional scrutiny if the objective observer concludes that the purpose or the effect of the monument advances a religious message demonstrating sectarian preferences.

In *McCreary County*, the Court held that two counties' actions of posting the Ten Commandments in their respective courthouses violated the Establishment Clause. The counties each put up large, gold-framed copies of the Ten Commandments in their respective courthouses. *McCreary County*, 125 S. Ct. at 2728. In McCreary County, the county legislative body issued an order requiring the display to be placed in a very high traffic area, and so it was. *Id.* In Pulaski County, a ceremony was held at the hanging of the display, which included numerous religious references and a pastor in attendance. *Id.* In both counties, the display was plainly visible to courthouse visitors. *Id.* The ACLU sued the counties, and within a month of the lawsuit's filing, "and before the [d]istrict [c]ourt had responded to the request for injunction, the legislative body of each [c]ounty authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are the 'precedent legal code upon which [Kentucky codified law is] founded,' and stating several grounds for taking that position." *Id.* at 2729. The expanded displays included the Ten Commandments, as well as eight other documents in smaller frames, all of which had a religious theme or highlighted a religious element. *Id.* The district court subsequently entered a preliminary injunction ordering these second displays removed, determining that they violated the Establishment Clause. *Id.* at 2730. The counties "then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the [c]ounties repeal the resolutions that preceded the second." *Id.* at 2730. The third display contained nine equally-sized framed documents, including a longer version of the Ten Commandments, along with eight other historical and legal documents, some of which contained religious references. *Id.* at 2730-31. Each document was posted with a statement regarding its historical and legal significance. *Id.* at 2731. The counties explained that the reasons for the display included "desires 'to demonstrate that the Ten

Commandments were part of the foundation of American Law and Government' and 'to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.'" *Id.*

The case wound its way to the Supreme Court. Once there, the Court forbade the courthouse displays and, in doing so, refined the purpose prong of the *Lemon* test. *Id.* at 2732-37; *see also ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 630-32, 635-36 (6th Cir. 2005); *Skoros v. City of New York*, 437 F.3d 1, 17 (2d Cir. 2006). The Court noted that "although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County*, 125 S. Ct. at 2735. In the examination of purpose, "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *Id.* at 2734 (internal quotations omitted). This reasonable observer has a reasonable memory, and knows the history and context of the government's actions. *Id.* at 2737. Furthermore, "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context." *Id.* at 2741.

The Court determined that it must "look to the record of evidence showing the progression leading up to the third display of the Commandments." *Id.* at 2738. The Court noted that the Ten Commandments are "a central point of reference in the religious and moral history of Jews and Christians[,]" and that the religious message of the Ten Commandments "is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view." *Id.* The Court noted that the first display, consisting of only the Ten Commandments, did nothing to

counter the sectarian implication, and further observed that the Pulaski County ceremony was attended by the county executive's pastor, who testified to the certainty of God's existence. *Id.* The Court remarked that "[t]he reasonable observer could only think that the [c]ounties meant to emphasize and celebrate the Commandments' religious message." *Id.* As to the first displays, the Court concluded that "the original text [of the Commandments] viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction[,]" thus "[w]hen the government initiates an effort to place this statement alone in public view, a religious object is unmistakable." *Id.* at 2739.

As to the second display, the Court observed that the other documents displayed contained the sole common element of highlighted references to God, and that the display's focus was on religious passages, thus demonstrating that the Ten Commandments were posted because of the sectarian content. *Id.* Noting that the counties did not attempt to defend their objective behind the second display, but instead described it as "dead and buried," the Court stated that the "refusal to defend the second display is understandable, but the reasonable observer could not forget it." *Id.*

Moving on to an examination of the third display, the Court noted that the new statements of purpose attending the display "were presented only as a litigating position, there being no further authorizing action by the [c]ounties' governing boards[,]" that the resolutions for the second display were not repealed, and that more of the purely religious language of the Ten Commandments was quoted than was in the first two displays. *Id.* at 2740. According to the Court, "[n]o reasonable observer could swallow the claim that the [c]ounties had cast off the objective so unmistakable in the earlier displays." *Id.* The Court also reasoned that the other posted material did not "suggest a clear theme that might prevail

over evidence of the continuing religious object[,]" as several important historical documents, such as the original Constitution and the Fourteenth Amendment were absent, while documents such as patriotic anthems and portions of the Magna Carta were displayed. *Id.* The Court found that this indicated that the reasonable observer "would probably suspect that the [c]ounties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." *Id.* at 2741. Thus, the Court, in upholding the district court's preliminary injunction, stated that "an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *Id.* However, the Court qualified the holding, stating that it did "not decide that the [c]ounties' past actions forever taint any effort on their part to deal with the subject matter." *Id.* Reading the majority opinion in its entirety and attempting to place its observations and holdings in context, we must conclude that it does not bring good news for the defendants in this case.

We now turn to review *Van Orden*, a case with a more favorable outcome for the defendants. There, a plurality of the Court, in upholding the constitutionality of a Ten Commandments monument on the grounds of the Texas State Capitol, found the *Lemon* test not useful in dealing with the sort of passive monument at issue in that case, and instead looked to the nature of the monument and our Nation's history.[7] 125 S. Ct. at 2861. The monument in *Van Orden* was

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7 The plurality examined the "two directions" in which cases point in applying the Establishment Clause. *Van Orden*, 125 S. Ct. at 2859. "One face looks toward the strong role played by religion and religious tradition throughout our Nation's history." *Id.* "The other face looks toward the principle that government intervention in religious matters can itself

located on the twenty-two acres surrounding the Texas State Capitol, an area that contained seventeen monuments and twenty-one historical markers, the presence of which commemorated the "'people, ideals, and events that compose Texan identity.'" *Id.* at 2858. The monument's primary content consisted of the text of the Ten Commandments, and it also included many smaller symbols, such as the Star of David, and Greek letters representing Christ. *Id.* The monument bore a prominent inscription that acknowledged that the monument was donated by the Fraternal Order of Eagles, a private social, civic, and patriotic organization. *Id.* The Eagles "sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." *Id.* at 2870 (Breyer, J., concurring). In deciding the text that would be displayed, the Eagles consulted "with a committee composed of members of several faiths in order to find a nonsectarian text." *Id.* (Breyer, J., concurring). The location of the monument was selected based on the recommendation of the state organization that was responsible for maintaining the Capitol grounds, and the dedication of the monument was presided over by two state legislators, there being no indication of religious-type ceremonies attending this dedication. *Id.* at 2858. The monument stood for approximately forty years without legal challenge. *Id.* at 2870 (Breyer, J., concurring).

[Footnote continued from previous page]

endanger religious freedom." *Id.* Both faces should be respected. *Id.* Noting the longstanding role of the Ten Commandments in the heritage of our country, *id.* at 2862, and the passive nature of the monument, *id.* at 2864, the plurality concluded that the monument did not violate the Establishment Clause. *Id.* at 2864.

In his concurring opinion agreeing that the monument did not violate the Establishment Clause,[8] Justice Breyer determined that "no single mechanical formula [] can accurately draw the constitutional line in every case." *Id.* at 2868, 2869 (Breyer, J., concurring) ("While the Court's prior tests provide useful guideposts ... no exact formula can dictate a resolution to such fact-intensive cases." (internal citations omitted)). He found that in borderline cases, there is "no test-related substitute for the exercise of legal judgment[,]" taking into account the context and consequences in light of the underlying purposes of the religion clauses.[9] *Id.* at 2869 (Breyer, J., concurring). "[T]o determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display." *Id.* (Breyer, J., concurring).

In examining the context of the display to determine the predominant message it conveyed, Justice Breyer looked to several different factors, including the circumstances surrounding the display's placement on state grounds, the display's physical setting, and the amount of time the display stood without challenge. *Id.* at 2370 (Breyer, J., concurring). Regarding the circumstances surrounding the display's placement, Justice Breyer found it noteworthy that the Eagles

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8 Justice Breyer's concurrence in *Van Orden* is the controlling opinion from which we must draw in this case. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotations omitted)).

9 However, Justice Breyer did note that he believed that the monument might satisfy more formal Establishment Clause tests, as it served a mixed but primarily nonreligious purpose. *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring).

sought to highlight the role of the Ten Commandments in shaping civic morality because of the Eagles' efforts combating juvenile delinquency, that the Eagles' attempted to find a nonsectarian text to display, and that the monument acknowledged that it was donated by the Eagles. *Id.* at 2870 (Breyer, J., concurring). He determined that these facts emphasized the Eagles' ethics-based, secular motive and distanced the State from the religious aspect of the monument's message. *Id.* (Breyer, J., concurring). Justice Breyer observed that the monument's setting did not lend itself readily to religious activity, but that it did "provide a context of history and moral ideals." *Id.* (Breyer, J., concurring). Thus, he reasoned that "the context suggests that the State intended the display's moral message -- an illustrative message reflecting the historical 'ideals' of Texans -- to predominate." *Id.* (Breyer, J., concurring). Justice Breyer further emphasized that the forty years that had passed without legal objection to the monument strongly suggested that most individuals "considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of cultural heritage." *Id.* at 2870-71 (Breyer, J., concurring).

Justice Breyer distinguished *Van Orden* from *McCreary County*, observing that in *McCreary County* the history of the displays "demonstrate[d] the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them." *Id.* at 2871 (Breyer, J., concurring). He stated that "a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this long-standing, pre-existing monument has not." *Id.* (Breyer, J., concurring). He concluded that in finding the monument constitutional, he relied "less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves[,]" specifically, avoiding religiously based divisiveness. *Id.*

(Breyer, J., concurring). Again focusing on the forty years the monument went uncontested, Justice Breyer noted that "as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is ... critical in a borderline case such as this one." *Id.* (Breyer, J., concurring). He concluded that "where the Establishment Clause is at issue, we must distinguish between real threat and mere shadow. Here, we have only the shadow." *Id.* (Breyer, J., concurring) (internal citation and quotations omitted).

This Court has stated that the determination of whether a display has the effect of endorsing religion centers around a fair understanding of the purpose of the display as may be held by viewers. *Van Orden v. Perry*, 351 F.3d 173, 177 (5th Cir. 2003), *aff'd* -- U.S. --, 125 S. Ct. 2854 (2005). The viewpoint to be examined is that of a reasonable observer, "not of the uniformed, the casual passerby, the heckler, or the reaction of a single individual." *Van Orden*, 351 F.3d at 177-78. This Court has stated that "[t]he guiding principle is government neutrality toward religion in the sense that a state cannot favor religion over non-religion or one religion over another[,]" thus the "proper application of First Amendment principles demands a sense of proportion and [the] inquiry is fact-sensitive." *Id.* at 178.

B

We now turn to an examination of the Mosher monument's purpose, focusing on the viewpoint of the objective observer, a person who is "familiar with the history of the government's actions" and the context in which those actions arose, and "who takes account of the traditional external signs that show up in the text, legislative history, and implementation" of the government's act. *McCreary County*, 125 S. Ct. at 2734-35, 2737 (internal quotations omitted). *McCreary County* makes clear that the entire history surrounding the monument is relevant -- a religious purpose

cannot be hidden one way or the other. An original religious purpose may not be concealed by later acts, nor may a newfound religious purpose be shielded by reference to an original purpose. In conducting our analysis, we note, as the Court in *McCreary County* noted regarding the Ten Commandments, that the Bible is a central point of reference in the religious history of Christians. *See id.* at 2738.

First, we examine the purpose of the monument in 1956, when it was first erected. The evidence is clear and indisputable that Star of Hope erected the monument to honor the life and contributions of Mosher. The Bible was included to represent that Mosher was a Christian, Christianity being an important part of the life being honored. The reasonable observer, cognizant of the history and context of the monument, would know about Mosher, his contributions to Star of Hope, and the importance of Christianity in his life. Thus, although some religious expression and religious values seem to have been behind the erection of the monument, it does not betray sound reasoning to conclude that, from the viewpoint of the objective observer, the primary purpose of the monument originally was to honor the life and contributions of a generous, compassionate, and well-respected citizen whose life reflected the Christian values that inspired his contributions to the community. *See Van Orden*, 125 S. Ct. at 2869-70 (Breyer, J., concurring) (noting that constitutional religious texts may convey both religious and secular messages). It is certainly true that Christian prayers were included in the dedication ceremony. Nevertheless, the fact that the monument, with the Bible, stood without complaint for thirty-two years, supports the notion that the original purpose was not objectively seen as predominantly religious. *See Van Orden*, 125 S. Ct. at 2870-71 (Breyer, J., concurring) (the significant length of time during which the monument stood without objection "suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of be-

liefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor" or promote religion).

Another phase of the monument's life began in 1988 with the removal of the Bible from the monument; then there was the absence of any Bible and the neglect of the monument for seven years. In 1995 there began the final phase with the refurbishment of the monument. Now this is the point at which the monument begins to morph into a religious symbol, an occurrence that would have been fully noticed by the objective observer.

As we have noted, the monument had been abandoned for seven years when the Bible was replaced in 1995, and the circumstances attending the replacement indicate an almost exclusively religious purpose for the restoration of the monument. First, the refurbishment of the monument was sparked by Judge Devine shortly after he premised his political campaign on putting Christianity back in government. Neither Judge Devine nor Friend had any relationship with Mosher, Mosher's family, or Star of Hope. Any suggestion that the primary concern, or even one significant concern, of Devine and Friend was to honor Mosher is factually baseless. Second, the "refurbishment" of the monument did more than simply restore the monument to its original form -- the monument was in fact altered, and in ways that are significant to this case. A red neon light surrounding the Bible was added to the monument, highlighting and illuminating the religious portion of the monument, where there had been no such previous focus or emphasis on the Bible. Furthermore, the refurbishment decisions were not made by anyone in a museum curator-type position, but instead all decisions appear to have been made by Friend and/or Judge Devine, whose motivations and interests seem to have been purely religious. Third, the rededication ceremony, which Harris County officials attended, featured several Christian minis-

ters leading prayers. *See McCreary County*, 125 S. Ct. at 2738 (noting that the presence of a pastor who testified about the certainty of the existence of God was a factor tending to show that the reasonable observer would think that the county was emphasizing and celebrating the religious message of the display); *cf. Van Orden*, 351 F.3d at 179-80, 181 (no indication of any religious aspect in original dedication ceremony and no indication of any ceremony attending reinstallation).

It is likewise noteworthy that the length of time between the refurbishment of the monument and the legal objection to it is relatively short, hardly spanning generations as did the time period emphasized by Justice Breyer in Van Orden. Furthermore, the 1995 refurbishment is "a more contemporary state effort to focus attention upon a religious text" that is more likely to prove divisive. *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring).[10]

Based on these events, the reasonable observer would conclude that the monument, with the Bible outlined in red neon lighting, had evolved into a predominantly religious

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10 The plaintiff argues that the 2003 rally in support of the monument, occurring after the lawsuit was filed seeking to remove the Bible, demonstrates that the monument has a primary religious purpose. The rally, where Harris County officials attended and spoke, focused almost solely on the display of the Bible. Little was said about Mosher or the monument itself, but the speeches focused on defending the Bible as part of the monument and on the lawsuit that had been filed seeking its removal.

The rally occurred after the lawsuit was filed and adversarial relationships had been established. We therefore find little relevance to this post-litigation conduct, which is influenced by the litigation as opposed to underlying the purpose of the monument. Litigating posturing is suspect in determining the purpose of a monument. *See McCreary County*, 125 S. Ct. at 2740-41.

symbol. In examining the distinct third phase of the monument, the objective observer would note the primarily religious purpose attached to the monument. Taking into account Judge Devine's political platform, the lack of connections between the refurbishers of the monument and Mosher or Star of Hope, the religious ceremonies attending the refurbishment, and the addition of a red neon light drawing added attention to the religious portion of the monument, an objective observer would conclude that the monument in its new phase of life had come to have a predominantly religious purpose. This observer would conclude that Judge Devine and his allies essentially had commandeered the monument for religious purposes, and that the primary purpose of the monument had now become religious.

Because the objective observer would conclude that the current purpose of the monument has evolved into, and presently constitutes, a religious symbol, the Mosher monument containing a Bible violates the Establishment Clause. For the foregoing reasons, the judgment of the district court is

AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

The panel majority exhibits an appalling hostility to any hint of religion in public spaces. Moreover, it does so by means of a misguided attempt to apply the Supreme Court's recent opinions in *McCreary*[1] and *Van Orden*.[2] The result is to enable a candidate for political office to alter the character and constitutionality of a longstanding, privately-owned memorial merely by invoking religion and making benign al-

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1 *McCreary County, Ky. v. ACLU*, 125 S. Ct. 2722 (2005).

2 *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

terations to the monument's appearance. The majority bases its indictment of the Mosher memorial not on any legislative resolution or official statement made at its dedication, but instead on the bare *interpretation* of its purpose by state judge John Devine nearly forty years into its existence.

This formerly unknown principle of constitutional law -- which perhaps should be crowned the "Principle of Devine Intervention" -- has serious doctrinal and practical consequences. First, it justifies the removal of a monument having a predominantly secular purpose, *see McCreary*, 125 S. Ct. at 2733, as long as *any* religious purpose arises during the course of the monument's multi-decade lifetime. Second, it places in particular jeopardy those monuments that are most deserving of judicial protection because they have "stood apparently uncontested for . . . generations" and are "unlikely to prove divisive" in the future. *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring). Because this result and reasoning reflect a fundamental misunderstanding of *McCreary* and *Van Orden*, I respectfully dissent.

I.

The panel majority opines that this is not the occasion to develop and apply the most "scholarly, historical, or convincing" approach to Establishment Clause jurisprudence. Irrespective of whether the majority is correct in that assertion, this case does present the occasion, for the first time in this circuit, to integrate *McCreary* and *Van Orden* into as coherent a framework as possible. Despite its desire to appear conflicted over the merits of the "objective observer" test, the majority proceeds to create an observer whose memory is short and whose antipathy to religion lacks any semblance of objectivity. Nothing in *McCreary* or *Van Orden* requires us to exercise the power of judicial review in such a censorial manner.

A.

The *Lemon* test remains the benchmark for reviewing the constitutionality of a monument on public property.[3] The purpose prong of that test, as modified by *McCreary*, 125 S. Ct. at 2733,[4] prohibits government from acting with the "ostensible and predominant purpose of advancing religion." The Court held that we may consider the evolution of a monument when evaluating its purpose, *id.* at 2728, but emphatically rejected the counties' position that purpose should derive solely from the most recent action taken with respect to a particular display:

> [T]he world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show.

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3 Though four Justices concluded that the *Lemon* test was "not useful" for evaluating a passive monument on government property, *Van Orden*, 125 S. Ct. at 2861, and a fifth Justice relied "less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves," *id.* at 2871 (Breyer, J., concurring), the *McCreary* majority opinion assumed the continuing vitality of *Lemon* in its analysis of the purpose of the Kentucky counties' displays. *See McCreary*, 125 S. Ct. at 2732-33.

4 I agree with Justice Scalia's observation in dissent in *McCreary* that the Court introduced a "heightened requirement that the secular purpose 'predominate' over any purpose to advance religion." *McCreary*, 125 S. Ct. at 2757 (Scalia, J., dissenting). Previously, *Lemon* required only that the government offer a non-sham secular purpose, whether it predominated or not. *See id.* at 2757-58 (Scalia, J., dissenting) (collecting sources).

Id. at 2736-37. The objective observer is not easily persuaded that a newly-articulated purpose should displace a well-settled, original purpose, because "reasonable observers have reasonable memories," *id.* at 2737, and "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *Id.* at 2740.

In *Van Orden*, Justice Breyer, in the controlling opinion, considered the "basic purposes" of the religion clauses -- in his view, preservation of religious liberty and tolerance, the prevention of social conflict that results from religious strife, and the separation of church and state -- in discerning the effect of a monument on the community. *See Van Orden*, 125 S. Ct. at 2868, 2871 (Breyer, J., concurring). Justice Breyer examined the circumstances surrounding the placement of the Ten Commandments on the state capitol grounds and the physical setting of the monument and concluded that the state intended a moral, non-religious message to predominate. *See id.* at 2870 (Breyer, J., concurring).

Moreover, in *Van Orden* the fact that the monument had survived forty years without legal challenge was determinative:

> [T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to engage in any religious practice, to compel any religious practice, or to work deterrence of any religious belief.

Id. (Breyer, J., concurring) (internal quotations omitted). It follows that judicial removal of a long standing monument would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions . . . [and] could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 2871 (Breyer, J., concurring).

The net effect of *McCreary*'s predominance standard and *Van Orden*'s emphasis on the longevity of the challenged display is to create a presumption that secular monuments of early provenance are constitutional, even if they contain subordinate religious elements.[5] If a monument lacks a "sectarian heritage," *McCreary*, 125 S. Ct. at 2737 n.14, the "objective observer" will be unmoved by an outlier's insistence that the monument was, in fact, intended to promote religion.

The collective wisdom of the community over an extended period of time provides more reliable evidence of the purpose of a public display than do the musings of "the uninformed, the casual passerby, the heckler, or the reaction of a single individual." *Van Orden,* 351 F.3d at 178. The appearance of religious themes in time-honored monuments, like the invocation of God in legislative session, at court arguments, or on our currency, is permissible official recognition of the place occupied by religion in the tapestry of our national culture.[6]

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5 *See Van Orden*, 125 S. Ct. at 2871 (comparing the long, peaceful history of the Texas monument with the "short (and stormy) history" of the Kentucky displays).

6 *See Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring) (noting the Establishment Clause's tolerance of "the prayers that open legislative meetings . . . certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins,

B.

Although the panel majority likely agrees with much of this analysis, it ultimately undermines the holdings of *McCreary* and *Van Orden* with two analytically dubious maneuvers that make its result possible. First, the majority asserts (without citation) that "a religious purpose cannot be hidden one way or the other" and is invalidating whether it arises early or late in a monument's history. This is demonstrably false. Implicit in the notion that the state may not act with the predominant purpose of advancing religion is that it *may* act with the *secondary* purpose of advancing it.

A religious purpose appearing for the first time nearly forty years after the foundation of a monument can hardly classify as "predominant." *McCreary* lends no support to the proposition that a newfound religious purpose automatically supersedes an original secular one. In *McCreary* the Court explicitly rejects that formulation:

> If someone in the government hides religious motive so well that the objective observer, acquainted with the [history and implementation of the government's action] cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides . . . . [I]t suffices to wait and see whether such govern-

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[Footnote continued from previous page]

decrees, and buildings; [and] the attention paid to the religious objectives of certain holidays, including Thanksgiving"); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that prayer opening a legislative session is "simply a tolerable acknowledgment of beliefs widely held among the people of this country").

> ment action turns out to have (as it may even be likely to have) the illegitimate *effect* of advancing religion.

McCreary, 125 S. Ct. at 2735 (emphasis added).[7] That is, if a monument has had a primarily secular history, the purpose inquiry ordinarily comes to an end; it suffices to see whether the monument "create[s] the . . . kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring).

It is true, of course, that in *McCreary* the counties offered sectarian purposes for the first two versions of their Ten Commandments display, then created a third display with a secular purpose advanced only as a "litigating position." *McCreary*, 125 S. Ct. at 2740. Surely, however, a different sequence of purposes (secular to religious) is not itself fatal, as long as secular purpose predominates over the course of the monument's existence.

Perhaps aware of the obstacle posed by the predominance test to its rush to drive religious mention from public view, the panel majority proceeds to commit a more grievous error: It conveniently partitions the monument's lifetime into three distinct time periods and finds that it is unconstitutional

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7 Furthermore, as already noted, *see supra* part I.A., *supra*, the opinion in *McCreary* is replete with language indicating that the objective observer does not forget the purpose underlying previous iterations of the same display. *See, e.g., McCreary*, 125 S. Ct. at 2737 n.14 (stating that "it will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose"); *id.* at 2739 (stating that though the counties attempted to describe as "dead and buried" the sectarian purpose underlying a previous version of the display, "the reasonable observer could not forget it").

because religious purpose predominates during the third period. Doubtless, the *McCreary* Court analyzed the Kentucky monuments by considering three phases of their evolution, but it took all three phases into account when holding that religious purpose predominated. *See id.* This is only sensible, because religious purpose will *always* predominate if one restricts the search for purpose to the most suspect period of the monument's history.

Likewise, if the *McCreary* Court had focused only on the third version of the Kentucky displays, it might have decided that case differently, because the state had recently offered legitimate secular purposes for its actions, such as educating the public about foundational documents that have influenced American law. *See id.* at 2739 & n.18. Though there may come a point, in the lifetime of a public display, at which the original purpose is so obscured that more recent statements of purpose take precedence, the predominance test exercises an inertial effect, presuming the centrality of the original purpose, unless there is compelling contrary evidence.

C.

That evidence is lacking here. The panel majority ably explains why the Mosher memorial passed constitutional muster between 1956 and 1988: It is "clear and indisputable" that the Star of Hope Mission erected the monument as a tribute to Mosher's life and beneficence, and it stood for thirty-two years without legal challenge. *See Van Orden*, 125 S. Ct. at 2870-71 (Breyer, J., concurring). During the memorial's "second" stage, between 1988 and 1995, there was no religious aspect to the monument at all, because the Bible was voluntarily removed (or never replaced) by the

Star of Hope after a challenge by a local atheist group.[8] It is only during the "distinct third phase," when Judge Devine restored and rededicated the monument, that the majority somehow ferrets out a "primarily religious purpose."

If the majority is correct that Judge Devine and his cohorts attempted to "commandeer[] the monument for religious purposes" long after it was installed as a private memorial, this is precisely the result that *McCreary* prohibits. Use of the monument as an instrument of a state judge's political campaign should no more affect the reasonable observer's evaluation of its predominant purpose than should the litigating position adopted by the Kentucky counties to defend the third version of their courthouse displays. *See McCreary*, 125 S. Ct. at 2740. Rather, the reasonable observer, placing the rededication ceremony in the context of the long history of the Mosher memorial, surely would conclude that the predominant purpose of the Mosher memorial in 1995 remained the same as it was in 1956: to honor the life of a Houston businessman and Christian philanthropist.

II.

Even assuming the validity of the panel majority's partitioning strategy for discerning government purpose, it gravely errs in the application of its premises to the post-1995 history of the monument. Though the majority describes as "factually baseless" the claim that Judge Devine restored the monument primarily to honor Mosher, that claim is amply supported by the record.

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[8] *Cf. Van Orden*, 351 F.3d at 181 (noting that the Ten Commandments were temporarily removed in 1993 during a Capitol construction project).

Devine testified that he learned about Mosher in the early nineties when he first saw the memorial before becoming a judge. He has since spoken with surviving members of the Mosher family and personally knows Carloss Morris, one of the founding members of the Star of Hope Mission. His court reporter, Karen Friend, invited the Mosher family to the rededication. What first attracted Judge Devine to the monument was its "state of disrepair," and he vowed "to restore that monument to its old glory."

If county officials can constitutionally allow a private group to erect a permanent memorial on public property, then surely a state official who works in county buildings may later take notice of the memorial's decrepit condition and seek to repair it, even if the person honored is long dead. We have never before rejected an admittedly secular purpose as a sham merely because the state actor, while still a candidate for office, ran on a general platform of putting Christianity back into government.[9] Rather, we have consistently recognized that "a purpose is no less secular simply be cause it is infused with a religious element."[10]

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9 When asked to explain his platform at trial, Judge Devine replied, "I try to live my life according to Christian values. And if that comes out in my service to the community, then I'm pleased about that." The desire to execute the duties of one's office according to personal Christian values hardly amounts to an intent to unify church and state. It is, instead, a constitutionally-protected use of another part of the First Amendment, the often-overlooked Free Exercise Clause.

10 *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 345-46 (5th Cir. 1999) (finding that mandatory disclaimer before teaching theory of evolution furthered the secular purposes of acknowledging alternative theories of the origin of life and reducing friction between parents and children on the subject); *see also Doe by Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 468 (5th Cir. 2001) (en banc) (deciding that a school program permitting clerical volunteers to counsel students advanced secu-

The panel majority also fails to explain how the presence of Christian ministers at the rededication ceremony, and the lack of involvement of a museum curator, distinguish the 1995 memorial from its 1956 predecessor. The record reflects that ministers attended the original ceremony and that the gatherers said prayers, neither of which fact suffices to negate a finding of predominant secular purpose, because prayer is an entirely appropriate component of a ceremony held in memory of the deceased.[11]

Nor did a museum curator participate in the monument's installation, a fact that is unsurprising given that no decision with respect to its installation or refurbishment required the judgment of a professional curator.[12] Although the analogy of a "museum setting" can be helpful in resolving cases of this nature, "[w]e need not accept the State's museum analogy in full measure" to find that the context of a display does not amount to an endorsement of religion.[13] Because the primary secular purpose is honoring a member of the community, rather than presenting a thematic collection of historic or artistic artifacts, the absence of a curator is not especially probative. At any rate, neither of these facts supports the panel majority's conclusion that the Mosher memorial somehow "morph[ed] into a religious symbol" between 1956 and 1995.

[Footnote continued from previous page]

lar purpose of "provid[ing] dialogue between the clergy and students regarding civic values and morality").

11 *See infra* part III (noting that the dedication of the Washington Monument included a prayer in President Washington's honor).

12 *Cf. Van Orden v. Perry*, 351 F.3d 173, 180-81 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005).

13 *Id.* at 181.

Additionally, in conducting its truncated purpose analysis the majority wholly ignores the fact that the monument entered a distinct *fourth* stage of its existence in 1997, when control over its operation and maintenance was returned to the Star of Hope Mission, whose members are intimately acquainted with its original purpose and with Mosher's life. The fact that the Mission controlled the monument for six additional years between the end of Judge Devine's supervision and the filing of this suit highlights the brevity of the time period that has given offense to the panel majority -- a scant two out of forty-seven years. The majority's hypothetical observer, so attentive to the sea-change in the monument's purpose supposedly wrought by the 1995 rededication, certainly would not have missed the fact that the original donors resumed possession two years later, thus removing any conjured constitutional infirmity.

III.

Finally, we must consider whether the appearance, setting, and alteration of this particular display would cause religious purpose to predominate or to have the impermissible effect of advancing religion. The Star of Hope Mission, a private charitable organization dedicated to meeting the needs of Houston's homeless population, conceived the monument as a memorial to Mosher, a considerable donor and supporter.[14] Critical to this monument's probable effect on the public -- and the likely reason why it survived so long unchallenged -- is its status *as a memorial*. Reflection on the sacred often accompanies the solemn remembrance of those who have departed this life.

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[14] *See Van Orden*, 125 S. Ct. at 2870 (Breyer, J., concurring) (noting that the donor of the Texas Capitol monument, the Fraternal Order of Eagles, is a private civic organization).

One need look no further than the National Mall to find examples of famous memorials featuring inspiring religious invocations. The Jefferson Memorial contains several inscriptions with references to God, such as the statement that "God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God?" The Lincoln Memorial contains inscriptions of the texts of President Lincoln's Second Inaugural Address and the Emancipation Proclamation, both of which reference God. At the dedication of the Washington Monument, a minister led the assembled crowd in prayer, which included this passage: "And now, O Lord of all power and majesty, we humbly beseech Thee to let the wing of Thy protection be ever outspread over the land of Washington!"[15] A Bible is in the cornerstone of the obelisk, at least two interior memorial stones feature Bible passages (including one with an open Bible in bas-relief), and the apex of the east face bears the inscription *Laus Deo*, or "Praise be to God." These monuments, which are indisputably constitutional, instruct that official use of religious symbolism is constitutionally appropriate in memoriam.

The Mosher memorial is merely one of several honorific markers located on or near the grounds of the courthouse, including two wall plaques commemorating previous county commissioners and a memorial to Walter Quebedeaux, a public servant and environmental activist. Although the Mosher memorial is the only one with religious content, the text is unthreatening to a non-adherent, because it is invisible to any observer who does not consciously decide to stand in front of the structure and look into the display.

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15 S. Doc. No. 57-224, at 131, 134 (1903).

Furthermore, unlike the counties in *McCreary* (and the Eagles in *Van Orden*, for that matter), the Star of Hope Mission never intended to emphasize any particular religious text in displaying the Bible: An important fact in this regard, to which the majority ascribes no significance, is that the Mission's members periodically turn the pages to preserve the physical integrity of the book. Instead of promoting a particular religious passage, the Mission intended the dedication to Mosher on the base of the monument to predominate, as shown by the fact that that dedication is both permanent and visible at a distance.[16] The objective observer can only conclude that the discreetness of the Bible both accommodates the Star of Hope's desire to include a symbol of Mosher's Christian faith in his memorial and respects the prerogative of the "[p]assersby who disagree with the message conveyed by these displays . . . to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *County of Allegheny v. ACLU*, 492 U.S. 573, 644 (1989) (Kennedy, J., concurring).

It remains to discuss the risible suggestion that we should attach significance to the apparently grave constitutional transgression that the current incarnation of the monument, unlike the original, contains a red neon light within the Bible display case. Karen Friend, who was closely involved with the restoration effort, testified that the light was originally installed to prevent the accumulation of moisture, an

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[16] *Cf. McCreary*, 125 S. Ct. at 2728 (observing that the Ten Commandments display is "readily visible to . . . county citizens who use the courthouse to conduct their civic business") (internal quotations omitted); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (opining that the only purpose of posting of Ten Commandments on classroom walls was "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments").

assertion supported by the fact that additional lights (not visible to the public) were later included in the base of the monument to dry the book from underneath, when moisture continued to be a problem.

Even if the light were installed primarily to illuminate the Bible, this is no cause for concern, for many public areas and displays are lit so that they may remain visible at night. Apparently wedded to the inaccurate notion that this light is particularly bright so as to attract attention (despite that a casual examination of the memorial reveals otherwise), the panel majority also somehow for gets that at oral argument, counsel for the plaintiff importantly conceded that a hypothetical *identical Biblical* monument, dedicated to the Reverend Martin Luther King, Jr., and obviously emphasizing the religious aspects of his life and service, would pass constitutional muster if it lacked a sectarian history.

The identity of the honoree, however, is a distinction without a difference. If a county could choose to honor a prominent spiritual and civil rights leader with a monument highlighting the Bible as a sign of his faith, there is no reason why they could not similarly honor a layman whose faith inspired a lifetime of philanthropy.

IV.

The panel majority does not, because it cannot, "decide that the Count[y's] past actions for ever taint any effort on [its] part to deal with the subject matter." *McCreary*, 125 S. Ct. at 2741. On the basis of the majority opinion, as a matter of logic, the Star of Hope Mission would be within its rights to rededicate the monument at some future date (five years later, or ten?) and restore its predominantly secular character, free from the influence of Judge Devine. I have no illusions, however, that the "objective observer," as formulated by this court, would be as quick to forget the religious exhortations

of Judge Devine as it today ignores the charitable contributions of William Mosher to the Houston community that memorialized him.

In a single misguided sentence, the majority reveals that what it seeks is not the predominant purpose of a display but the systematic exclusion of religion from the public sphere: "An original religious purpose may not be concealed by later acts, nor may a newfound religious purpose be shielded by reference to an original purpose." Bound by this premise, future panels of this court need not engage in the delicate task of deciding whether the record before us reveals, on balance, a governmental purpose to advance or inhibit religion. Rather, we may discharge our judicial duties merely by citing the above language, enjoining a private memorial whenever or wherever religious sentiment appears in the course of its existence over decades or even centuries.

This approach, however, inaccurately reflects the balance struck by the Court in *McCreary* and *Van Orden* between government neutrality and respect for the religious traditions of the United States and the American People. Accordingly, I respectfully dissent.

APPENDIX C

KAY STALEY,
Plaintiff,

v.

HARRIS COUNTY, TEXAS,
Defendant.

CIVIL ACTION NO. H-03-3411

In The United States District Court
For The Southern District Of Texas,
Houston Division

August 10, 2004, Decided

MEMORANDUM OPINION

Plaintiff Kay Staley brought this action against Harris County, Texas, seeking to permanently enjoin the County from displaying an open King James Bible in a display case located atop a stone monument near the Harris County Civil Courthouse at 301 Fannin, Houston, Texas. Staley alleges that the display of the Bible on County property violates the Establishment Clause of the First Amendment to the United States Constitution. The County denies that there is any First Amendment violation because the display of which the Bible is a part has a secular purpose, does not advance religion, and does not foster excessive government entanglement with religion. On August 2 and 3, 2004, the parties presented evidence to support their contentions.

I.

To put the parties' arguments and the evidence in context it is first necessary to summarize the relevant law. Amendment I to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition Government for a redress of grievances.

The first clause of this Amendment is commonly known as the Establishment Clause; the second clause is commonly known as the Free Exercise Clause. Although by its terms the First Amendment only applies to Congress, the Fourteenth Amendment to the Constitution prohibits states and other governmental entities from denying religious liberties guaranteed by the First Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903 (1940).[1]

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971), the Supreme Court articulated three criteria for determining whether government action violates the Establishment Clause. Under the *Lemon* analysis the challenged state practice is permissible if (1) it has a secular pur-

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[1] Amendment XIV to the United States Constitution, ratified in 1868, states

> Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

pose, (2) its primary or principal effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement with religion. A governmental entity violates the Establishment Clause if it fails to satisfy any of these criteria. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S. Ct. 2573, 2577 (1987).

Unfortunately, it is difficult to find coherent guidance from the Supreme Court's later opinions applying the *Lemon v. Kurtzman* analysis. The Court's decisions are often reached by fractured majorities, with differing concurring opinions seeking to explain the result. The Court's decisions do, however, yield some general prevailing themes. In explaining the first *Lemon* criterion the Supreme Court has stated:

> The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes. . . . The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion.

Lynch v. Donnelly, 465 U.S. 668, 690-91, 104 S. Ct. 1355, 1368 (1984) (O'CONNOR, J., concurring).

In addressing the second *Lemon* criterion, whether the principal effect advances or inhibits religion, the Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion. . . ." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592, 109 S. Ct. 3086, 3100 (1989). The Court has explained

> that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred.*" *Wallace v. Jaffree,* 472 U.S., at 70, 105 S. Ct., at 2497 (O'CONNOR, J., concurring in judgment) (emphasis added) . . . . Moreover, the term "endorsement" is closely linked to the term "promotion," *Lynch v. Donnelly*, 465 U.S., at 691, 104 S. Ct., at 1368 (O'CONNOR, J., concurring), and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite," *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968).
>
> Whether the key word is "endorsement," "favoritism," or "promotion" the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S., at 687, 104 S. Ct., at 1366 (O'CONNOR, J., concurring).

Allegheny, 492 U.S. at 593-94, 109 S. Ct. at 3101.

To determine whether a religious display has the effect of endorsing religion a court must determine "what viewers may fairly understand to be the purpose of the display." *Allegheny*, 492 U.S. at 595, 109 S. Ct. at 3102 (*citing Lynch*, 465 U.S. at 692, 104 S. Ct. at 1369 (O'CONNOR, J., concurring)). "That inquiry, of necessity, turns upon the context in

which the contested object appears: '[A] typical museum setting, though not neutralizing the religious context of a religious painting, negates any message of endorsement of that context.' . . . . 'Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.'" *Id.* (citing *Lynch,* 465 U.S. at 692, 104 S. Ct. at 1369-70).

The Fifth Circuit has explained that "this is the observation of a reasonable observer, not the uninformed, the casual passerby, the heckler, or the reaction of a single individual." *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2003). As Justice O'Connor explained in her concurring opinion in *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 779-80, 115 S. Ct. 2440, 2455 (1995),

> [T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe. . . . [T]he endorsement test creates a more collective standard to gauge "the 'objective' meaning of the [government's] statement in the community." *Lynch, supra, at* 690, 104 S. Ct. at 1468 (O'CONNOR, J., concurring). . . . [T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.

II.

With this legal background in mind the court now turns to the history and setting of the King James Bible display and then in Part III to an application of the *Lemon* test to these facts.

The Harris County Civil Courthouse was built in 1910 and is owned and operated by Harris County, Texas, a political subdivision of the State of Texas. The Courthouse is located at 301 Fannin Street, in an area of downtown Houston containing many other county government buildings. The Courthouse is an imposing, six-story, granite building that occupies the center of an entire city block between Congress and Preston Streets and Fannin and San Jacinto Streets. The Courthouse originally housed all county and state courts and county government offices. Over the years as other county courthouses and county buildings were erected the building was designated as a Civil Courthouse and currently houses 18 courts, as well as the county and district clerks' offices.

In 1953 the Star of Hope Mission, a local Christian charity that provides food and shelter to indigents, decided to build a memorial to William S. Mosher, a prominent Houston businessman and philanthropist who died in 1948. Mosher had been a long-time, active supporter of the Star of Hope Mission. Carloss Morris, the president of the Star of Hope Mission, approached the Harris County Commissioners Court and secured permission to erect a memorial to Mosher on the County Courthouse property. Morris testifies that the Star of Hope Mission selected a location in front of the Courthouse because of the permanence and prominence of its location.

The Star of Hope Mission designed and paid for the Mosher monument. It was erected in 1956 in a plaza 21 feet from the main, Fannin Street, entrance to the Courthouse. The monument measures two-feet-six-inches by three feet and is four-feet-five-inches high. Engraved on the front surface of the monument, and occupying most of the area of the front surface, is the following inscription:

STAR OF HOPE
MISSION

ERECTED IN LOVING MEMORY
OF
HUSBAND & FATHER
WILLIAM S. MOSHER
A.D. 1956

The top part of the monument is a glass-topped display case that is sloped towards the Courthouse entrance. The Star of Hope Mission placed an open Bible in the glass display case to memorialize Mosher's Christian faith.[2] There are no other items in the display case. The sloping top of the monument with the Bible has the appearance of a lectern. There is no written explanation on the monument as to why the Bible is there. A public ceremony, which included Christian prayers, was held in 1956 to dedicate the Mosher monument.

Morris testified that one of the Star of Hope's purposes for including the open Bible in the display was to convey to the public that Mosher was "a godly man" who had helped others. The Bible in the display case was intended to represent Mosher's Christianity. Morris also testified that the presence of the Bible in the monument conveys to people that this is a Christian government.

Because the Mosher monument faces the main entrance to the Courthouse, it is readily visible to attorneys, litigants, jurors, witnesses, and other visitors to the Courthouse. However, a passerby would have to walk up to the monument to observe that it contains a Bible and would have to stand in

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[2] Minutes from 1953 and 1956 meetings of the Star of Hope Board of Directors refer to the Mosher monument as "the Bible stand memorial" [Plaintiff's Exhibits 24 and 24A], "the Bible Memorial" [Plaintiff's Exhibit 24B], and "the Bible Stand" [Plaintiff's Exhibit 24C].

front of it to read the Bible. The open Bible as displayed measures twelve-by-sixteen inches.

There are two wall plaques and two free-standing historical markers in the same area as the Mosher monument. Neither the plaques nor the historical markers contain any religious message. No other open books are displayed in or near the Courthouse. There are other monuments, markers, and plaques in and near other county buildings, but none of them contain a religious message.

The Star of Hope Mission maintained the monument from 1956 until 1995. The monument was vandalized several times and the Bible stolen. Each time the Star of Hope Mission replaced the Bible. In 1988 atheists complained about the Bible to the Harris County Commissioners Court and asked that it be removed. Although the evidence on this point is not entirely clear, it appears that the Star of Hope Mission decided either to remove the Bible or not to replace it again, rather than face potentially costly litigation. From 1988 until 1995 the top of the monument remained open and empty, and it was often used as a trash bin.

In 1995 John Devine was elected a state district judge. Devine campaigned on a platform of putting Christianity back into government. As a judge he initially officed in a county building near the Civil Courthouse and later moved to the Courthouse. His official court reporter was Karen Friend. In 1995 Devine and Friend embarked on a project to solicit private donations to refurbish the Mosher monument, which had fallen into a state of disrepair, to restore a Bible to the display case, and to add neon lighting to the display case.

Devine sought and obtained approval from Harris County to make the improvements. Harris County did not pay for any of the improvements to the monument or for the new Bible. A ceremony was held in November of 1995 to

commemorate the refurbishing of the monument and the replacement of the Bible. A number of Christian ministers led prayers at the rededication ceremony. Spectators and participants sang "The Battle Hymn of the Republic," a patriotic hymn that extols Christ's glory.

In 1996 and again in 1998 Friend paid to repair the lights in the display case and for repairs to the display case to protect the Bible from moisture. Since 1995 Harris County has paid for electricity to illuminate the neon lights that were installed in 1995. The cost of providing this electricity is $93.16 per year. For a few years after the monument was refurbished Friend turned the pages of the Bible and selected the pages to display. Since 1997 the Star of Hope Mission has maintained the monument and turned the pages of the Bible. Although Harris County does not maintain the Mosher monument, it retains the authority to move or alter it.

Kay Staley is a resident and taxpayer of Harris County. She is also an attorney who passes by the monument going to and from the Courthouse in the course of her profession. She testified that she is offended by the Bible display in the Mosher memorial because it advances Christianity and it sends a message to her and to non-Christians that they are not full members of the Houston political community.

After Staley filed this action asking that the County be ordered to remove the Bible display, supporters of the Bible display held a large rally on September 4, 2003, in the Courthouse plaza next to the Mosher monument. Several hundred rally participants prayed and stressed that the Bible was a foundation of the Christian faith. County Judge Robert Eckels, Judge Devine, and Harris County Attorney Mike Stafford spoke at the rally and participated in prayers led by Christian ministers. Eckels and Stafford stated that the County would strongly oppose the lawsuit. The County Judge is the chief executive officer of Harris County. He

presides over meetings of the Harris County Commissioners Court, the legislative body that establishes County policy.

III.

A. County Responsibility

Harris County first argues that it bears no legal responsibility in this action. Citing *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440 (1995), the County argues that because the County does not own or maintain the monument, the Bible display should be considered a private expression of free speech by the Star of Hope Mission, and the County should bear no responsibility under the Establishment Clause. The court is not persuaded by this argument.

Pinette involved a 10-acre, state-owned square surrounding the courthouse in Columbus, Ohio. "For over a century the square had been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious." *Pinette*, 515 U.S. at 757, 115 S. Ct. at 2444. For many years the Capitol Square Review and Advisory Board allowed a number of diverse groups to erect booths, art exhibits, and unattended displays on Capitol Square.

The issue in *Pinette* was whether the Board was justified in denying an application by the Ohio Ku Klux Klan to place a cross on the square for three weeks in December of 1993 based upon the Board's conclusion that allowing the cross would violate the Establishment Clause. The Supreme Court's conclusion that the proposed cross would not violate the Establishment Clause was driven by the fact that "Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years." 515 U.S. at 767, 115 S. Ct. at 2449.

Unlike in *Pinette*, there was no evidence in this case that the area surrounding the Courthouse has been designated or used as a traditional public forum for erecting booths or displays. Unlike in *Pinette*, the Bible display is also permanent, and there was no evidence that the County allowed private groups, whether religious or secular, to erect permanent monuments on the Courthouse grounds.

The County's argument is similar to arguments advanced by defendants in *County of Allegheny v. American Civil Liberties Union*. There the defendants argued that a sign disclosing that the crèche prominently displayed on the main staircase of the county courthouse was owned by a Roman Catholic organization showed that the religious organization, not the county, was promoting a Christian message. The Supreme Court rejected this argument, holding that

> the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. . . . Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

492 U.S. at 600-601, 109 S. Ct. at 3105.

In this case County officials approved both the original inclusion of the Bible in the Mosher memorial monument in 1956 and its reintroduction in 1995. By allowing an open Bible to be displayed in front of the main entrance to the Courthouse, the County has allowed the communication of the Christian religious message that the Star of Hope Mission

and Judge Devine sought to advance. Accordingly, the County is responsible if the presence of the Bible in the Mosher monument violates the Establishment Clause. *See Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 303, 120 S. Ct. 2266, 2275-76 (2000) (emphasizing that selective access to government property does not create a public forum, moreover, the "mere creation" of a public forum does not "shield [] the government entity from scrutiny under the Establishment Clause") (*citing Pinette*, 515 U.S. at 772, 115 S. Ct. 2440).

B. Purpose and Effect of the Bible Display

In arguing that the Mosher memorial has a secular purpose, the County focuses on the stone monument itself, not the Bible that sits atop it. The Mosher monument serves the secular purpose of honoring the memory of a respected Houston citizen. But plaintiff would have no complaint were the issue merely an empty monument to Mr. Mosher. Plaintiff's complaint is with the Bible display.

The issues in this case are whether the evidence establishes a secular purpose for the Bible display and whether the setting in which the Bible appears and the facts related to its installation in 1956 and its refurbishing in 1995 support the conclusion that a reasonable viewer would see the Bible display as an endorsement of religion.

The King James Bible can advance both secular and religious purposes:

> The two greatest influences on the shaping of the English language are the works of William Shakespeare and the English translation of the Bible that appeared in 1611. The King James Bible -- named for the British king who or-

> dered the production of a fresh translation in 1604 -- is both a religious and literary classic.
>
> . . .
>
> [T]he Bible is far more than a work of literature. For Christians -- the world's largest religious grouping -- the Bible tells the story of the creation of the world by God, and its redemption through Jesus Christ. The Bible speaks words of hope in the face of suffering and death. It tells of a New Jerusalem, in which pain, sorrow, and death are things of the past.

Alister McGrath, *In the Beginning The Story of the King James Bible and How it Changed a Nation, a Language, and a Culture* 1-2 (Anchor Books 2002).

The Bible can have a secular purpose, for example, when read as literature in a classroom or in studying the development of the English language. *See Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 194 (1980). But no one has suggested such a secular purpose in this case.

The court concludes that although the primary purpose of the Star of Hope Mission for erecting the stone monument was to honor William S. Mosher, the purpose for installing the open Bible in the glass display case was to commemorate Mosher's Christian faith. The monument by itself, without the Bible, honors Mosher and his affiliation with the Star of Hope Mission. But, Mosher was a devout Christian, and the Star of Hope Mission chose to honor his Christian faith by prominently displaying an open Bible atop the memorial monument to him. The Bible is clearly an "instrument of religion." *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 224, 83 S. Ct. 1560, 1572

(1963). The religious purpose of the original Bible display is evidenced by the facts that minutes of the Star of Hope Mission's board consistently refer to the Bible, that the dedication ceremony included Christian prayers, and that the President of the Star of Hope Mission, who conceived of the monument and obtained the County's permission for it, believes that the purpose of the Bible was to honor and promote Mosher's Christian faith.

The facts surrounding the refurbishing of the monument in 1995 and its purpose since then also evidence a religious, not a secular, purpose. Neither Judge Devine nor Karen Friend knew Mosher or had any relationship with him, his family, or with the Star of Hope Mission. Their purpose in refurbishing the monument was to replace the Bible and make its presence more prominent by adding lighting to the display case. The circumstances surrounding the monument's refurbishment may be considered in determining the purpose of the refurbishment. *See Books v. City of Elkhart, Indiana*, 235 F.3d 292, 303-04 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 2209 (2001) (holding that despite the County's stated secular purposes of providing a code of conduct and recognizing the historical and cultural significance of the Ten Commandments, the circumstances surrounding the Ten Commandments monument, including dedication speeches by prominent religious leaders, demonstrated that the purpose of displaying the Ten Commandments "was to promote religious ideals").

By its nature and setting, even without the testimony regarding the original purpose of the Bible in the monument and the testimony of those who replaced the Bible in 1995, the court concludes that the purpose of the Bible display is to encourage people to read the Bible. What other purpose could there be for prominently displaying an open Bible in an illuminated case tilted toward passersby in a heavily frequented plaza in front of the main entrance to the Court-

house? As the Supreme Court explained in a related context in *Stone v. Graham*:

> If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

449 U.S. at 42, 101 S. Ct. at 194.[3]

Given the Bible's setting, the 1995 Christian ceremony held to commemorate its return to the Mosher monument, the 2003 Christian rally held in opposition to its removal, the presence of Harris County officials at both events, and the absence of any explanation for the presence of the open Bi-

---

[3] The County notes in its briefs that the Fifth Circuit has stated that state action challenged under the Establishment Clause can satisfy the first criterion of the *Lemon* test if that action has "a" valid secular purpose, "even if that secular purpose is but one in a sea of religious purposes." *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999) (*citing Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985)). However, *Wallace*, upon which the Fifth Circuit relied, describes the first *Lemon* criterion as requiring that the challenged state action have "a *clearly* secular purpose." *Wallace*, 472 U.S. at 56, 105 S. Ct. at 2489 (emphasis added). Furthermore, the Court concluded in *Wallace* that, despite the defendants' recitation of secular purposes, the evidence showed that the challenged state action "was not motivated by any clearly secular purpose -- indeed, the statute had *no* secular purpose." *Id.* (striking down a statute authorizing daily meditations or prayers in Alabama schools) (emphasis in original). The facts of this case refute the County's argument that the Bible display had any secular purpose, let alone a "clearly secular purpose."

ble, the court also concludes that a reasonable observer would understand that Harris County endorses the Bible and encourages its citizens to read it. *See, e.g., Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied,* 124 S. Ct. 497 (2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999, 123 S. Ct. 1909 (2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162, 122 S. Ct. 1173 (2002); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058, 121 S. Ct. 2209 (2001) (all holding that installation on government property of monuments prominently displaying the Ten Commandments would suggest to reasonable observers that the government endorsed the religion represented by that text and discussing the circumstances surrounding the monuments' installations, which demonstrated government officials' involvement).

Although the County argues that Judge Eckels and County Attorney Stafford were not appearing in their official capacities at the September 4, 2003, rally and that their comments at the rally did not legally bind Harris County, the court concludes that a reasonable observer would believe that they were speaking for Harris County, particularly since these County officials appeared at the rally during business hours, referred to their County affiliations, and described the County's reaction to the lawsuit.

To understand how the court reached these conclusions it is instructive to compare the facts of this case with other cases in which religious symbols have faced constitutional scrutiny.

In *Van Orden*, 351 F.3d 173, the Fifth Circuit addressed the constitutionality of a granite monument erected on the grounds of the Texas State Capitol in which the Ten Commandments were etched. The Fifth Circuit noted that the Ten Commandments have a secular as well as a religious mean-

ing and that the monument containing the Ten Commandments was one of a number of monuments erected on the capitol grounds. The court noted that "there was no religious service attending the acceptance of the monument. . . . [and] there is no evidence of any religious invocations or that any minister, rabbi, or priest was ever present." 351 F.3d at 179.

Perhaps the clearest dichotomy of what is and is not permissible under the Establishment Clause is provided by the holding in *Allegheny*. In that case a civil liberties organization and certain individuals sued Allegheny County and the City of Pittsburgh to enjoin two holiday displays: a crèche placed on the grand staircase of the Allegheny Courthouse and a Chanukah menorah placed outside a city-county building next to a Christmas tree and a sign saluting liberty. "The crèche included figures of the infant Jesus, Mary, Joseph, the farm animals, shepherds, and wise men all placed in or before a wooden representation of a manger, which has as its crest an angel bearing a banner that proclaims 'Gloria in Excelsis Deo!'" 492 U.S. at 580, 109 S. Ct. at 3094. No figures of Santa Claus or other decorations appeared on the grand staircase. A block away, outside a different city-county building, city employees had erected a 45-foot tree with lights and ornaments. A few days later the city placed at the foot of the tree a sign with a proclamation by the mayor entitled "Salute to Liberty." The city also placed in the same location an 18-foot Chanukah menorah of an abstract tree and branch design. The tree, liberty proclamation, and menorah were removed the following January.

The Supreme Court held that the crèche on the courthouse stairway violated the Establishment Clause, but that the menorah did not. The Court held that

> the crèche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government . . . .

> No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the crèche in this particular physical setting," . . . the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.

492 U.S. at 599-600, 109 S. Ct. at 3104.

The Court observed that "the display of the Chanukah Menorah in front of the City-County Building may well present a closer constitutional question." 492 U.S. at 613, 109 S. Ct. at 3111. Although the menorah was a religious symbol, it also had secular dimensions. The menorah stood next to a Christmas tree and a sign saluting liberty, neither of which were religious symbols. The Court explained that the city could celebrate both Christmas and Chanukah as secular holidays. The Court also noted that the large tree was the predominant element of the city's display and that the mayor's sign saluting liberty and Pittsburgh's legacy of freedom further diminished the possibility that the menorah would be interpreted as an endorsement of Judaism. The Court concluded:

> Given all these considerations, it is not "sufficiently likely" that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an "endorsement" or "disapproval . . . of their individual religious choices."

492 U.S. at 620, 109 S. Ct. at 3115 (citations omitted).

The facts of the present case are readily distinguishable from the Ten Commandments approved in *Van Orden* and

the menorah that passed scrutiny under the endorsement-prong of the *Lemon* test in *Allegheny*. The facts here are more analogous to the crèche display held unconstitutional in *Allegheny*. In this case:

> (1) Like the crèche in *Allegheny*, the Bible is prominently displayed by itself in a court-house setting.
>
> (2) Like the crèche in *Allegheny*, but unlike the menorah in *Allegheny*, the Bible sits by itself; it is not part of a larger display of other objects.
>
> (3) Unlike the menorah in *Allegheny*, there is no sign explaining the presence of the Bible.
>
> (4) Unlike the Ten Commandments in *Van Orden*, the original dedication of the Mosher memorial monument in 1956 and the ceremony that accompanied its refurbishment in 1995 included Christian prayers and hymns and addresses by Christian ministers.
>
> (5) Unlike the Ten Commandments in *Van Orden*, there is direct evidence from the person who conceived of the Mosher memorial monument and from those who refurbished the Mosher monument and returned the Bible that the purpose for the inclusion of the Bible was to honor Mr. Mosher's Christian faith.

IV.

Some witnesses at trial stated that requiring the removal of the Bible from the Mosher monument would send the message that religion serves no role in our society, and that government is hostile to religion.

This nation has a strong religious heritage. Two of the four principal migrations from England to America were motivated by a desire to freely exercise different religious beliefs. Thousands of Puritans settled in Massachusetts between 1629 and 1641. Over 20,000 Quakers settled in New Jersey, Pennsylvania, and Delaware in the late 1600s and early 1700s.[4] Religion played an important role in colonial life. But the colonists, reflecting their European heritage of state-sponsored religion, soon began to establish state-supported churches and to persecute those of different faiths. *See Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 9-10, 67 S. Ct. 504, 508-09 (1947).[5] The Colonial experience taught the drafters of the *Bill of Rights* that the new national government should not enforce any particular belief but that neither should the national government prohibit the free exercise of religion. *The government should be neutral*: It should neither support nor oppose religion or any particular

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[4] George Brown Tindall and David E. Shi, *America: A Narrative History* 85 (3rd ed. 1992).

[5] As one prominent historian of 18th century America explains:

> [All of] the colonies . . . except Rhode Island -- which provided complete religious freedom for all Christians and toleration for others -- imposed limitations upon various sects; no colony gave full rights to Catholics or Jews; and most colonies had tax-supported denominational establishments. Penalties for dissenters, apostates, blasphemers, and idolators were numerous and severe.

Forrest McDonald, *Novus Ordo Seclorum* 42 (U.P. Kansas 1985).

religious practice. As the Supreme Court explained in *Everson*,

> [t]he people [in Virginia], as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

330 U.S. at 11, 67 S. Ct. at 509.

In the context of this case religious neutrality means that Harris County should not be seen as endorsing Christianity. But that does not mean that by requiring the removal of the Bible from the Mosher monument, this court, the drafters of the Bill of Rights, or the United States government are hostile to religion. It means that everyone is free to adopt and practice his or her own faith, or not to adopt any form of faith, without any pressure, direct or implied, from government.

As the Supreme Court explained in *School Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 226, 83 S. Ct. 1560, 1574 (1963),

> [t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly

> committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.

When, as in this case, a Bible is displayed in a prominent public setting, with no explanation of its purpose, a reasonable viewer with knowledge of the Courthouse and its plaza, the Bible display, the ceremony commemorating the refurbishment of the monument, and the protests subsequently held at that monument would conclude that the Bible display conveys the message that Christianity is favored or preferred by Harris County.

The court concludes that Harris County has failed the first two elements of the *Lemon* test. The Bible atop the Mosher monument does not have a secular purpose, and the primary or principal effect of the Bible display is to advance religion. The court therefore concludes that the Bible display violates the Establishment Clause of the First Amendment to the United States Constitution.[6]

---

[6] Since the County has failed the first two criteria, the court need not address the third *Lemon* criterion: entanglement. Moreover, the Supreme Court's most recent discussion of the *Lemon* test's entanglement criterion characterized it as "folded" into the "primary effect" inquiry:

> In *Agostini v. Felton*, 521 U.S. 203, 218, 232-233, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, *see ibid.*, and the degree of entanglement has implications for whether a statute advances or inhibits religion, *see Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'CONNOR, J., concurring).

Zelman v. Simmons-Harris, 536 U.S. 639, 668-69, 122 S. Ct. 2460, 2476 (2002) (O'CONNOR, J., concurring). The Court then proceeded to char-

V.

The Civil Rights Attorneys' Fees Act, 42 U.S.C. § 1988, provides that the court should award the prevailing party in this action reasonable attorney's fees. To determine a reasonable attorney's fee the court multiplies the reasonable and necessary time expended by the customary hourly rate for the legal work performed. *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) (In certain cases the court can adjust the attorney's fees upward or downward, but no adjustments are relevant in this case.). The court concludes that plaintiff's attorney reasonably expended 163.6 hours for legal work in this case and that his reasonable rate is $225 per hour, resulting in reasonable and necessary attorney's fees of $ 36,810.00. The court also concludes that plaintiff

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[Footnote continued from previous page]

acterize the current Establishment Clause test (be it a two-or three-prong test) as "basically the same as that set forth in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) . . . , over 40 years ago." In other words, even in pursuing the "entanglement" analysis, a court's central concern must be whether the challenged state action has the "primary effect" of endorsing or inhibiting religion, the issue addressed above.

incurred reasonable and necessary expenses of $3,776. These fees and expenses will be awarded to plaintiff.

SIGNED at Houston, Texas, on this the 10th day of August, 2004.

/s/ Sim Lake

Sim Lake
United States District Judge

APPENDIX D

KAY STALEY,
Plaintiff,

v.

HARRIS COUNTY, TEXAS,
Defendant.

CIVIL ACTION NO. H-03-3411

In The United States District Court
For The Southern District Of Texas,
Houston Division

August 10, 2004, Decided

FINAL JUDGMENT

In accordance with the court's Memorandum Opinion, the court **ORDERS**, **ADJUDGES**, and **DECREES** that

(1) Harris County remove the Bible from the Mosher monument within ten days from the entry of this Final Judgment; and that

(2) Harris County pay to plaintiff, Kay Staley, the sum of $ 40,586.00 in attorney's fees and expenses within ten

days from the entry of this Final Judgment.

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this the 10th day of August, 2004.

/s/ Sim Lake

Sim Lake
United States District Judge

APPENDIX E

KAY STALEY,
Plaintiff-Appellee

v.

HARRIS COUNTY TEXAS,
Defendant-Appellant

No. 04-20667

In The United States Court
Of Appeals For The Fifth Circuit

Appeals From the United States
District Court for the
Southern District of Texas

ON PETITION FOR REHEARING EN BANC

November 17, 2006, Filed

Before: JONES, Chief Judge, KING, JOLLY, DAVIS, SMITH, WIENER, BARKSDALE, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO and OWEN, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX F

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 28, 2006

TO COUNSEL LISTED BELOW:

No. 04-20667 - Staley v. Harris County TX
USDC No. 4:03-CV-3411

Dear Counsel:

This Court has been advised that the Old Civil Courts Building at 301 Fannin, where the Mosher Monument is located, has been closed for several months and all court facilities previously located therein have moved out. Plans are in place for the Old Civil Courts Building to be substantially repaired, refurbished, and renovated so that it would become the new location of Texas' First and Fourteenth Courts of Appeal sometime in 2009 at the earliest. Therefore, the Court requests that counsel address in their briefs the nature and extent of this change of circumstances as it bears upon issues stemming from Article III's case or controversy re-

quirements, including but not limited to standing and mootness.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: _____
Geralyn Maher, Deputy Clerk
504-310-7630

Ms Ayesha Khan
Mr Bruce S Powers

Mr Randall L Kallinen

cc: Hon. Sim T. Lake III
Mr Benjamin David DuPre'
Mr Joshua William Carden
Mr Steven W Fitschen
Mr David L Hagen
Mr Peter Dominick Lepiscopo
Mr Michael F Linz
Mr Stephen Todd Loden
Mr Kelly J Shackelford
Mr Douglas G Smith
Mr Joel Lance Thollander
Mr Edward Lawrence White III

FILED
AUG 29 2007
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 07-100

In the Supreme Court of the United States

HARRIS COUNTY, TEXAS,

Petitioner,

v.

KAY STALEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Though the County purports to present a single question, its Petition actually raises two independent legal issues:

(1) A party seeking vacatur bears a heavy burden to demonstrate equitable entitlement. This Court and the courts of appeals have uniformly held that when a case becomes moot on appeal, vacatur turns on the equities, with special attention paid to the parties' respective responsibilities for the mooting event and to the public interest.

The County unilaterally removed the challenged religious display over three years into this lawsuit, after a panel of the Fifth Circuit had affirmed the district court's decision. Although the County claimed that the removal was part of a longstanding courthouse renovation, it acted on the Friday before oral argument; and it had not previously informed the courts of the renovation or its potential impact on the monument. When the County redisplays the monument, it can move to clarify, modify, or dissolve the injunction if necessary. In the meantime, the district court's decision will have no legal effect on other public or private displays.

The first question presented by the Petition is whether the en banc court erred in concluding that the County failed to meet its heavy burden of demonstrating equitable entitlement to vacatur under these circumstances.

(2) The courts of appeals have uniformly treated attorneys' fees separately from vacatur, consistently holding that a civil-rights plaintiff is entitled to a fee award when she obtains a final judgment in the district court and the case then becomes moot on appeal, whether the judgment remains intact or is vacated.

The second question presented by the Petition is whether a civil-rights plaintiff is deprived of her statutory right to fees when the defendant unilaterally moots the case on appeal after the plaintiff has obtained a favorable final judgment.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

For the first three years after this lawsuit was filed, Petitioner Harris County opposed Respondent Staley's claim on the merits, vociferously arguing that the challenged religious display was permissible under Establishment Clause jurisprudence. That argument bore little success: The district court rejected it, as did a panel of the Fifth Circuit. After obtaining en banc review, the County abruptly changed course: On the eve of the en banc oral argument, the County removed the monument, placed it in storage, and claimed that the case had thereby become moot.

The County's claim to mootness did not rest on garden-variety cessation of challenged conduct. Rather, the County said that it intended to redisplay the monument in the future, but argued that the case was nonetheless nonjusticiable because the details of the future display were unknown. Seeking unfettered discretion in erecting that future display, the County asked the en banc court to vacate the district court's decision. The County also asked the court to deny Staley attorneys' fees.

The decision of an overwhelming majority of the en banc Fifth Circuit to deny vacatur under those circumstances was consistent with the decisions of this Court and the other circuits, all of which recognize that vacatur is an equitable, case-specific remedy. No circuit has recognized the existence of a split in this area, and none of the cases that the County cites applied legal rules that conflict with those applied by the en banc court.

The County's Petition is really a request that this Court substitute its own analysis of the equities for the analysis of the court below. But the equities to which the County points are grossly insufficient to outweigh the considerations that counsel against vacatur. And because vacatur rulings are case-specific, a ruling from this Court would have little effect on any case beyond this one.

Not a single judge on the en banc court accepted the County's invitation to deny Staley attorneys' fees. That comes

as no surprise, for the circuits agree that a plaintiff who obtains a favorable final judgment from a district court remains the prevailing party if the case becomes moot on appeal, whether or not the decision is vacated. Even if this Court were inclined to give the lower courts guidance in this area despite the lack of a circuit split, this case would present a particularly poor vehicle for doing so in light of the timing of, and the parties' respective responsibilities for, the mooting event.

STATEMENT

A. The Factual Background

The monument at issue was conceived by a Christian charity, Star of Hope Mission. The monument consists of an open Bible atop a glass-encased podium bearing the following inscription:

Star of Hope Mission
Erected in Loving Memory of Husband & Father
William S. Mosher
A.D. 1956

Pet. App. 66a-67a. The Bible was included as the monument's centerpiece to "honor and promote" Christianity (*id.* at 74a) and to send the message that "this is a Christian government" (*id.* at 67a).[1]

The monument was installed in 1956 outside the main entrance of the Harris County Civil Courthouse in Houston, Texas, upon a unanimous vote of the Harris County Commissioners (Trial Tr. 221-22, 234-35), all of whom later

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[1] The County claims that the Bible was included to "exemplif[y] the connection between Mr. Mosher's religious faith and his charitable work." Pet. 2-3. But there is nothing on the monument to suggest that Mosher even *participated* in charitable work, let alone to establish that the Bible was included to commemorate the connection between the two. And the district court did not find that the Bible served that function; rather, the court found that the Bible was included to "memorialize," "commemorate," and "honor" Mosher's Christian faith. Pet. App. 67a, 73a, 79a.

attended the monument's 1956 unveiling (*id.* at 229). The unveiling ceremony included Christian prayers (Pet. App. 67a) and was attended by "a lot of the preachers around the city" (Trial Tr. 229).

Between 1956 and 1988, the monument was vandalized and the Bible stolen and replaced several times. Pet. App. 68a. In 1988, after county residents complained about the Bible, it was again removed (or not replaced); and from 1988 to 1995, the display remained empty. *Id.*

In 1995, state-judge John Devine obtained the County's permission to refurbish the monument as part of his campaign promise to "put[] Christianity back into government." *Id.* Devine believed that "we are a Christian nation" (Trial Tr. 248), and he sought through the renovation to "get the word of God back into" people's lives (*id.* at 243-44). Devine asked his court reporter to spearhead the refurbishment. *Id.* at 199. She accepted the assignment as part of her religious "duty [to] tell others what the Bible says." Pl.'s Trial Ex. 28 (Friend Aff. ¶¶ 21-22).

The monument was both restored and embellished. The Bible was replaced and outlined in red neon lighting to give it greater prominence. Pet. App. 30a, 68a, 74a. The King James Version was selected for the refurbished display — not because it was consistent with the monument's original contents, but because Devine's court reporter believed that version of the Bible to be "historically correct." Trial Tr. 203.

The 1995 rededication ceremony was attended by Devine, his court reporter, Harris County's chief executive, and "pastors from the whole community." *Id.* at 249; *see also id.* at 133, 144, 201. The ceremony included a "whole bunch" of Christian prayers. *Id.* at 249; *accord* Pet. App. 69a.[2]

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[2] Almost all the facts pertinent to the refurbishment — including Devine's motivations and the nature of the unveiling ceremony — go unmentioned by the County. *Cf.* Pet. 3. The County also mischaracterizes the refurbishment (continued...)

B. The Proceedings Below

After holding a two-day bench trial and viewing the monument (Trial Tr. 90), the district court found that the monument was originally displayed, and later refurbished, with a predominantly religious purpose. Pet. App. 72a-75a. The court also found that the display's configuration, setting, and history would lead a reasonable observer to conclude that the County had endorsed religion. *Id.* at 75a-76a.

A panel of the Fifth Circuit affirmed. *Id.* at 26a-60a. Judge Jolly, joined by Judge Higginbotham, held that although the monument was not erected with a predominantly religious purpose in 1956, the 1995 restoration was constitutionally flawed under *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), because it was a contemporary endeavor, driven by wholly religious rather than historical motivations, that transformed the display into "a predominantly religious symbol." Pet. App. 41a-45a.

Judge Smith dissented, arguing both that *McCreary* and *Van Orden* create a presumption that old monuments are constitutional, and that Devine's intervention was insufficient to overcome that presumption. Pet. App. 45a-56a (Smith, J., dissenting).

The County sought and obtained rehearing en banc. Its petition argued that the panel erred in concluding that the display was unconstitutional, but did not mention that the

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[2] (...continued)
as "private." *See id.* The *funds* for the restoration were raised from private sources; but in all other respects, the refurbishment was a government-driven affair — overseen by a state district judge, approved by the Harris County Commissioners, and subsequently publicly financed when the County assumed the electric bill for the added lighting. Pet. App. 30a, 68a-69a. The district court rejected the County's argument that the monument constitutes private rather than public speech (*see id.* at 71a-72a), a conclusion that neither the panel nor the en banc court revisited.

courthouse was being remodeled or that the display was slated for removal. *See* Pet. for Reh'g En Banc (Aug. 29, 2006). Immediately after granting rehearing, however, having independently learned of the renovation, the en banc court requested that the parties address whether the remodeling project affected Staley's standing to sue or mooted the case. Pet. App. 89a-90a.

At that point, the County seized on a litigation strategy that it believed held the promise of letting the County off scot-free despite the weakness of its position on the merits. The County argued in its en banc brief, for the first time in the case, that the case was moot because the monument would be removed at some unknown future time. Although the Petition suggests that the County asserted mootness as an afterthought (Pet. 4), that was in fact the County's lead argument; and half of its brief was devoted to mootness and related arguments. *See* County's En Banc Br. 7-15, 30-32. The County pledged that it would redisplay the monument in the future, but it argued that a challenge to the renewed display was unripe because the details of the redisplay were currently unknown. *Id.* at 8, 10.

Staley responded by arguing that the fact that a case may become moot in the future does not make it moot now; that it was unclear whether the monument's planned removal was precipitated by the renovation or by the County's desire to moot the case; and that the County had not met its burden of establishing that the challenged action would not recur. Accordingly, Staley argued that the case should be remanded for an initial mootness determination predicated on factfinding regarding the County's plans and motivations. Staley's En Banc Br. 12-19.

On the Friday before the Tuesday en banc oral argument, having received Staley's brief explaining that the monument's possible future removal could not have already rendered the case moot, the County removed the monument and placed it in storage (Pet. App. 3a) — timing that the en banc court

understandably found suspicious (*see id.* at 10a, 13a-14a). The basis for suspicion only grew when, in response to the court's request, the County submitted a "Timeline" showing that the renovation had begun in 2004 and that the courthouse had closed for the renovation even before the *panel* had issued its decision in 2006. *See* App. 9a, *infra* (noting that "the courts vacated the 1910 Courthouse and moved into the new Harris County Civil Courthouse" in March 2006); Pet. App. 21a n.1 (DeMoss, J., dissenting) (noting that "[t]he Old Civil Courts Building closed on April 28, 2006, and the new courthouse opened the following Monday, on May 1, 2006").

Neither the County nor its counsel claimed to have only recently learned of the renovation. *Cf.* Pet. 2 (eliding the question by stating: "As the County prepared for oral argument before an en banc panel of the Fifth Circuit, events unrelated to the litigation mooted the County's appeal."). Indeed, the County has not provided, either here or in the court below, any explanation for why it failed to raise the issue earlier — or why, after nearly three year's renovation, the removal just happened to fall on the eve of the oral argument.

The en banc majority held that the monument's removal mooted the case (because the relief requested had been obtained), and that any dispute over the redisplay was unripe — thus giving the County just what it had sought. Pet. App. 6a. But the court declined to strip Staley of her district-court victory, concluding that the County had not overcome the presumption against vacatur that attaches when mootness results from the unilateral act of the party that lost below. *Id.* at 10a-14a. In evaluating the equities, the court found that the County's proffered benign reason for the removal was outweighed by a host of other considerations: The County had failed to suggest mootness or to keep the courts updated on the status of the renovation, even though the project began in 2004; Staley had obtained full relief in the district court and an affirmance from a three-judge panel; and retaining the district court's decision

would stave off litigation over "identical issues by the same parties under the same circumstances" when the County redisplays the monument. *Id.* at 12a-14a.

Two dissenters argued that the case law from other circuits makes vacatur available when the mooting action is taken for reasons unrelated to the litigation (*see id.* at 18a-21a (DeMoss, J., joined by Smith, J., dissenting in part)), but the majority explained that the equities in those cases counseled in favor of vacatur to a far greater extent than did the circumstances here. *Id.* at 10a-12a. Three other judges did not reach the vacatur question, instead agreeing with Staley that a remand for further factfinding was necessary because the County had not met its burden on mootness under the existing record. *Id.* at 16a-18a (Garza, J., joined by Clement and Owen, JJ., dissenting).

The en banc court also rejected the County's argument that Staley should be denied attorneys' fees under 42 U.S.C. § 1988. But this time, none of the sixteen judges on the court accepted the County's argument — not even the two dissenters who favored vacatur of the district court's decision. *See* Pet. App. 15a; *id.* at 18a-25a (DeMoss, J., dissenting in part) (remaining silent on fee question).

REASONS FOR DENYING THE WRIT

I. The En Banc Court Employed a Legal Standard and Reached a Result on Vacatur That Is Consistent with the Decisions of this Court and All the Circuits.

A. This Court Has Provided the Lower Courts with Clear Direction on the Prevailing Legal Standards.

This Court has on several occasions addressed the legal standards to be applied in awarding vacatur.

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which involved a price-fixing lawsuit mooted by changes in the governing regulatory structure, the Court stated in dictum that "[t]he established practice" when a civil case becomes moot

while on appeal is to "reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. The Court did not grant vacatur, however, but merely suggested that vacatur would have been granted had it been requested at an earlier stage in the proceedings. *Id.*

Thereafter, in *Crowell v. Mader*, 444 U.S. 505, 506 (1980) (per curiam), the Court summarily directed vacatur of a district-court judgment when a state legislature mooted the case by replacing the challenged legislation.

This Court next visited the question of vacatur in *Karcher v. May*, 484 U.S. 72 (1987). In *Karcher*, a state legislature intervened to defend a challenged statute after the named defendants had capitulated. After the district court declared the statute unconstitutional and the court of appeals affirmed, the intervening legislators lost their leadership posts and their replacements declined to continue with the appeal, thereby concluding the case. This Court denied the former legislators' request for vacatur because the case became moot not "due to circumstances unattributable to any of the parties," but as a result of the decision of the newly substituted defendants not to continue prosecuting the case. *Id.* at 83.

The next step in the evolution of vacatur doctrine was *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). In *Bancorp*, the plaintiff had won in both the district court and the court of appeals, and the case had settled while pending in this Court. The defendant then moved for vacatur of the district court's decision. In a unanimous opinion, this Court held that vacatur is an extraordinary remedy as to which the party seeking relief bears the burden of demonstrating equitable entitlement. *Id.* at 26; *see also id.* at 24 (noting that moot cases must be disposed of in the manner "most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot") (internal quotation marks omitted).

The Court considered the various policy arguments and the concerns of the public that are at stake when a case becomes moot on appeal. *Id.* at 25-29. It concluded that the equities will generally counsel in favor of vacatur when mootness is caused by "happenstance" — which the Court described as involving "circumstances unattributable to any of the parties" (*id.* at 23 (quoting *Karcher*, 484 U.S. at 82)) — or when "mootness results from the unilateral action of the party who prevailed below." *Id.* at 25.[3]

In contrast, when "the party seeking relief from the judgment below caused the mootness by voluntary action," the equities will generally counsel against vacatur. *Id.* at 25. And when the parties share equal responsibility for the mootness (as in a settlement), vacatur is similarly disfavored because the party seeking vacatur needs to show that it bears *less* responsibility for the mootness than the opposing party in order to meet its burden. *Id.*at 26. In the Court's view, "[t]o allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would — quite apart from any considerations of fairness to the parties — disturb the orderly operation of the federal judicial system." *Id.* at 27.

The Court declined the invitation to address the propriety of the lower court's decision as part of the vacatur analysis because the federal courts lack the constitutional power to make "assumptions about the merits" once a case is moot, and because there is benefit in allowing the lower courts to tease out an issue, both rightly and wrongly, before it reaches this Court.

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[3] The *Bancorp* Court proffered a rationale for the suggestion in *Munsingwear* that vacatur would have been granted there had it been requested: "that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of the United States." 513 U.S. at 25 n.3. The *Bancorp* Court "express[ed] no view" on whether that conclusion represents a proper application of the "happenstance" doctrine. *Id.*

Id. at 27. The Court also rejected the argument that the availability of vacatur would facilitate settlement, noting that vacatur "may *deter* settlement at an earlier stage" because "litigants . . . may think it worthwhile to roll the dice rather than settle . . . [if] an unfavorable outcome can be washed away by a settlement-related vacatur." *Id.* at 28.

The Court cautioned, however, that vacatur should not always be denied even when mootness results from settlement. *Id.* at 29. Rather, "the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of [vacatur]" in a different case. *Id.*

In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), this Court reiterated that vacatur is an equitable remedy permitting of no bright-line rules. In that case, the plaintiff-employee had won in the district court and then mooted the case by quitting her job while the case was pending in the court of appeals. But neither she nor the employer's counsel timely informed the appeals court of her resignation. Even though *Bancorp* advised that vacatur is normally favored when mootness is caused by the winning party (*see Bancorp*, 513 U.S. at 25), this Court did not base its decision to vacate on that fact alone. Rather, the Court also considered both the plaintiff's lack of candor regarding the mooting events, and federalism concerns arising from retention of the decisions below, ultimately concluding that vacatur was appropriate under those "exceptional circumstances." *Id.* at 74-75; *see also id.* at 68 n.23.[4]

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[4] In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 173, 179 (2000), the plaintiffs prevailed in the district court on their claim against an alleged polluter; but while the case was pending in this Court, the defendant shuttered the offending plant. Although remanding for a mootness determination, the Court noted that vacatur would likely be unavailable even if the case were found moot because the mootness would have resulted from the "voluntary conduct of the party that lost in the District Court." *Id.* at 194 n.6.

(continued...)

These cases together provide sufficient "guidance on the factors that would make vacatur appropriate" (Pet. 7): All the equities must be considered, including the parties' respective responsibilities for the mootness, the policy considerations at stake, and the public interest. And as demonstrated below, the lower courts have had little trouble implementing those instructions.

B. There Is No Circuit Split on the Legal Principles to Be Applied When Mootness Results from the Actions of the Losing Party.

The County claims that there is a circuit split on whether "happenstance" vacatur is to be awarded when mootness results from voluntary conduct by the losing party that is unrelated to the litigation. Pet. 7-14.[5] But no court has recognized a split;

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[4] (...continued)

Laidlaw relied on *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677-78 (1944), in which this Court denied vacatur upon the defendant-corporation's dissolution. *See Laidlaw*, 528 U.S. at 194 n.6. The dissolution, undertaken "to secure tax advantages," had consisted of the "simple expedient of dissolving [the family business] and continuing the business under the individual control of members of the family." *Walling*, 321 U.S. at 673, 675. The Court analogized those circumstances to mootness, explaining that "[i]f a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Id.* at 677. The Court concluded that justice requires that "petitioner is entitled to retain the benefit of the judgment entered in his favor by the District Court." *Id.*

[5] The County's Petition leaves the impression that vacatur is always unavailable when the mooting event is *related* to the litigation. But even there, vacatur turns on the equities of the particular case. When mootness is caused by the defendant's acquiescence in the judgment, vacatur is usually denied (*see Bancorp*, 513 U.S. at 25-26; *Karcher*, 484 U.S. at 83), though that is not always the result (*see, e.g., McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996)). And when mootness results from *involuntary* compliance with an unstayed judgment, vacatur is usually granted (*see, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974); *Bagby v. Beal*, 606 F.2d 411, 414, 417 (3d Cir. 1979)), though that too is not guaranteed (*see, e.g., Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, (continued...)

and although two dissenters below thought that the majority's ruling gave rise to one (*see* Pet. App. 18a-21a (DeMoss, J., dissenting)), the eleven judges in the majority rejected that conclusion, explaining that the cases cited in the dissent did not entail the equities here. *Id.* at 12a & n.4.[6]

The County thus takes upon itself the task of dividing the cases into two camps: those supposedly applying an automatic rule of "happenstance" vacatur when the losing party, while responsible for the mootness, acted for reasons unrelated to the litigation (*see* Pet. 10-13); and those considering equitable factors beyond the motivation for the mooting action (*see id.* at 13-14).[7]

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[5] (...continued)
842 (1988)).

[6] The County misreads the en banc decision when it claims that, "[u]nlike the Fifth Circuit, several courts of appeals continue to follow the rule that vacatur is required in cases of 'happenstance . . . .'" Pet. 7. The court below plainly recognized that mootness resulting from "happenstance" calls for vacatur. *See* Pet. App. 9a-10a n.2; *accord id.* at 8a. But the attribution of mootness to happenstance is a legal conclusion that turns on the equities in the case. *Cf. Bancorp*, 513 U.S. at 25 ("The reference to 'happenstance' in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur."). The County's gripe with the en banc court relates not to whether happenstance merits vacatur, but to whether the mooting event here should be deemed happenstance.

[7] Even if this Court were to adopt the former rule, as the County advocates, it would not necessarily change the outcome in this case. The County repeatedly states that the en banc court "reject[ed] any inference that the County removed the Monument as part of a litigation strategy." Pet. 4 (quoting Pet. App. 10a ("we acknowledge that the bottom-line cause of the removal was related to the ongoing renovations")); *accord* Pet. 13. But the quoted clause from the opinion says only that the removal was "related" to the renovation, not that the renovation was the *sole* motivation for the removal. Indeed, the clause immediately preceding the quotation — "the timing of the removal may be open to question" (Pet. App. 10a) — underscores the court's view that the removal on the eve of the oral argument may well have been a litigation strategy. And whatever factual "findings" the
(continued...)

But the first category does not exist: Every decision that the County places in that category eschewed the application of automatic vacatur rules — and no decision elevated intent over all other considerations. To be sure, in some of those cases, the courts declined to apply the *Bancorp* presumption when the mootness resulted from a statutory amendment passed without an illegitimate motive. But that was because the mootness had resulted from *legislative* action, a context that presents unique considerations and involves a mooting entity distinct from the party-defendant — factors on which the courts relied in granting vacatur. Accordingly, the County errs both in citing those decisions as holding that vacatur is warranted when the losing party moots a case for reasons unrelated to the litigation, and in applying their holdings to a nonlegislative context.

1. Legislative-amendment cases are inapplicable here because they are exempt from the *Bancorp* presumption.

In the legislative context (as in all others), the courts have uniformly held that vacatur is an equitable remedy permitting of no bright-line rules. *See Nat'l Black Police Ass'n v. District of Columbia* ("*NBPA*"), 108 F.3d 346, 351 (D.C. Cir. 1997)

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[7] (...continued)
en banc court might have made in this regard were premised solely on statements that the County had made to the court, rather than on independent fact-gathering.

The County's subsequent treatment of the monument also appears to have been driven by the litigation. The County has said that it intends to redisplay the monument "elsewhere on county property" (Bill Murphy, *Monument's Removal Adds Twist to Bible Display Appeal*, Hous. Chron., Jan. 22, 2007, at A1), but the County has never explained why it must wait until the renovation is complete before doing so. There is nothing sacred about the old courthouse grounds; the County could easily have chosen to transfer the monument (without the Bible, of course) to the grounds of the new courthouse or to any other government space. Instead, it appears that the County is attempting to manipulate the outcome of the litigation by leaving the monument in storage.

(stating that "vacatur is an equitable remedy, not an automatic right," and that "where mootness results from voluntary action, vacatur should not be granted unless to do so would serve the public interest"); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194-95 (3d Cir. 2001) (rejecting application of any "categorical rule" on vacatur because "vacatur is an equitable remedy rather than an automatic right," and holding that "absent unusual circumstances, the appellate vacatur decision under *Bancorp* is informed almost entirely, if not entirely, by the twin considerations of fault and public interest") (citation omitted); *Rendell v. Rumsfeld*, 484 F.3d 236, 243 (3d Cir. 2007) (analyzing particular circumstances of case and concluding that "[o]n balance, . . . it is most equitable to wipe the slate clean") (internal quotation marks omitted); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 117-18 (4th Cir. 2000) (holding that "absent unusual circumstances, the appellate vacatur decision . . . is informed almost entirely, if not entirely, by the twin considerations of fault and public interest"; that when party seeking relief from judgment has caused mootness, vacatur is available only in "'exceptional circumstances'" (quoting *Bancorp*, 513 U.S. at 29); and that when mootness is fault of neither party, or results from unilateral action of party who prevailed below, vacatur will be granted subject "to considerations of the public interest").

To be sure, these courts recognized that the *Bancorp* presumption against vacatur is generally inapplicable when mootness results from a legislative amendment passed without intent "to overturn an unfavorable precedent" (*NBPA*, 108 F.3d at 351; *accord Rendell*, 484 F.3d at 243; *Khodara*, 237 F.3d at 195);[8] but the abandonment of the presumption was premised on

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[8] The County erroneously claims that the legislative-amendment cases call for vacatur when the mooting action is "unrelated to the litigation." Pet. 8. Vacatur in those cases turned on whether the amendment was specifically intended to undo the unfavorable decision, not on whether the amendment (continued...)

the peculiarities of the legislative context, where there are special separation-of-powers concerns and the mooting action is not taken by the party-defendant. *See NBPA*, 108 F.3d at 352-53 (relying on "[s]eparation of powers concerns" "to exempt from *Bancorp*'s presumption . . . the situation of a case which has become moot . . . due to passage of legislation," and declining to attribute mootness to defendant because, "in most multi-branch governments defense of existing laws falls to the executive whereas initiation of legislation is the responsibility of the legislature"); *Brooks v. Vassar*, 462 F.3d 341, 349 (4th Cir. 2006) (holding that "a State legislature's amendment of a challenged law is not . . . attributable to the State's executive officials defending a challenge to that law"), *cert. denied*, 127 S. Ct. 2251 (2007); *Valero*, 211 F.3d at 121 (granting vacatur because "mootness was . . . caused by the state *legislature*'s amendment of statutory provisions . . . , and not by the actions of any of the defendants before this court, all of whom are state *executive* officials, none of whom is the Governor [who signed the amendment]"); *Rendell*, 484 F.3d at 243 (granting vacatur where mooting action was "not attributable to the defendant," and had been taken by nonparties, including U.S. Congress, in fulfillment of a legislative responsibility).[9]

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[8] (...continued)
was related to the litigation. *NBPA*, 108 F.3d at 351; *accord Khodara*, 237 F.3d at 195 (granting vacatur when amendment was "a commendable effort 'to repair what may have been a constitutionally defective statute'" (citation omitted)).

[9] When the legislators are themselves the parties-defendant, a vacatur ruling is likely to come out the other way, irrespective of the relationship between the mooting event and the litigation. In *Ford v. Wilder*, 469 F.3d 500 (6th Cir. 2006), for example, a state-senate candidate sued members of the state legislature for trying to void an election in which she had prevailed. After she won below, and while the case was on appeal, a senate commission voided the election on an entirely different basis and a new election was held, thereby mooting the case. In declining to vacate the district court's decision, the Sixth Circuit evaluated all the equities in the case: The party seeking (continued...)

The Fifth Circuit has likewise granted vacatur when mootness results from a legislative amendment unattributable to the party defendant. *See, e.g., AT&T Commc'ns v. City of Dallas*, 243 F.3d 928, 931 (5th Cir. 2001) (vacating decision in plaintiffs' favor after State of Texas legislatively mooted case); *AT&T Commc'ns v. City of Austin*, 235 F.3d 241, 244 (5th Cir. 2000) (same).

Whether one characterizes these decisions as creating an exception to the *Bancorp* presumption or as simply falling outside the terms of that presumption (because the mooting action is not attributable to the losing party), the result is the same: The doctrine is *sui generis* to the legislative context.

Even in that context, however, vacatur is not assured. *See NBPA*, 108 F.3d at 354 (holding that "vacatur should [not necessarily] be granted in all cases" involving a legislative amendment passed without "illegitimate motive," because "vacatur is an equitable remedy and the record in particular cases may militate in favor of denying vacatur"). Accordingly, it is simply untenable to claim that *NBPA* and the other legislative-amendment cases adopted an automatic rule of vacatur for *any* circumstance, let alone for cases that arise outside the legislative arena.

But beyond that, actions taken by municipalities are not governed by the legislative-amendment cases because they do not give rise to the considerations raised by federal and state legislation. *See Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 880 (9th Cir. 2006) (noting that "[t]he rule of vacatur [for mootness resulting from legislative amendment] is

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[9] (...continued)
relief from the judgment below had caused the mootness by voluntary action; the legislative-mooting cases were inapplicable because "the defendants' legislative action mooted a case brought directly against them"; the facts suggested that the legislature "knew or should have known" that its conduct was substantially likely to moot the appeal; and the defendants had not shown that vacatur would further the public interest. *Id.* at 506 & n.10.

for . . . enactments of Congress and state legislatures" and that "[t]he strength of the rule may attenuate for lesser public bodies and those with mixed legislative and executive character"); *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 76 F.3d 1142, 1144-45 (10th Cir. 1996) (denying vacatur when appeals court learned at oral argument that city-defendant had amended challenged drug-testing policy, even though city claimed that amendment was interim measure designed to allow continued drug-testing and was not passed as effort to comply with district court's opinion or to moot case).

Unlike federal and state governments, which include entirely separate executive and legislative branches, Harris County has a unitary, five-person governing body. That body was responsible for: displaying the monument and authorizing its refurbishment (Pet. App. 71a; Trial Tr. 221-22, 235; defending the litigation (*see Travis County v. Matthews*, 235 S.W.2d 691, 697 (Tex. Civ. App. 1950) (a county's "right of defense [in litigation] is held by the Commissioners' Court since the powers and duties of a county are vested in a Commissioners' Court")); and overseeing the courthouse renovation (*see* App. 3a-6a, *infra*). Accordingly, unlike the legislative-amendment cases, the decision of the court below represents a straightforward application of *Bancorp*'s presumption of nonvacatur when mootness results from the actions of the party that lost in the district court.

2. The circuit-court decisions arising outside the legislative-amendment context apply the same legal standards as those applied below.

The only nonlegislative decisions that the County places on the pro-vacatur side of a purported circuit split are from the Ninth Circuit. *See* Pet. 10. But that Circuit, like all the others, has explicitly repudiated the application of "automatic vacatur" when mootness results from actions unrelated to the litigation, holding that, in that context as in all others, "the touchstone of vacatur is equity." *Dilley v. Gunn*, 64 F.3d 1365, 1369-70 (9th

Cir. 1995); *accord Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996).

In *Dilley*, a prisoner had obtained a favorable district-court ruling on his challenge to the lack of adequate access to a law library, but the case became moot when he was reclassified and transferred to a lower-security prison while the case was on appeal. The court remanded the vacatur question, but it offered some guidance to the district court on the equitable analysis to be undertaken: It evaluated the competing policy considerations and concluded that although, "[a]s a general matter," vacatur may be inappropriate "even if the appellant engaged in the conduct which caused the mootness for a purpose other than to prevent the appellate court's review of the district court's order,"[10] mootness should nonetheless be attributed to happenstance in this case if the evidence on remand shows that the prisoner's transfer was "wholly unrelated to th[e] lawsuit," because "[t]o hold otherwise might create an incentive for prison officials to hinder routine transfers that would otherwise be available to and desired by inmates who have obtained favorable but not yet reviewed judgments in the district court." *Id.* at 1371-72. Thus, not only was the court's conclusion based on a policy consideration particular to the case, but the court explicitly repudiated the application of a blanket rule.

The Ninth Circuit employed that same nuanced approach in *Cammermeyer*, 97 F.3d at 1239, denying vacatur when, for reasons unrelated to the lawsuit, the Army mooted the plaintiff's case by changing its regulatory regime. The court noted that "the decision to vacate is not to be made mechanically, but should be based on equitable considerations," and explained that the "principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 1239 (quoting

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[10] Like the court below (*see* Pet. App. 11a), the Ninth Circuit noted that this "factor[, when present,] may weigh equitably in favor of vacating the order." *Dilley*, 64 F.3d at 1372 n.6.

Bancorp, 513 U.S. at 18). (Because the mooting action in *Cammermeyer* was a regulatory change by the executive branch, the case entailed different equities than those involved when the mootness results from a legislative amendment. *See NBPA*, 108 F.3d at 353.) Although the mooting action had not been driven by the litigation or taken "to moot the appeal," the court nonetheless denied vacatur in light of the other equities in the case. *Cammermeyer*, 97 F.3d at 1239. Thus, it cannot reasonably be said that the Ninth Circuit adheres to an automatic rule of attributing to happenstance all actions that are "not taken to influence the litigation." Pet. 10. Rather, vacatur in that Circuit, as in all the others, depends on the policy considerations and equities presented by the particular case.[11]

The County concedes that the First Circuit likewise treats the mooting party's intent as just one of the considerations pertinent to a vacatur ruling. *See* Pet. 14 (citing *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002)). Indeed, in *Kerkhof*, the court granted vacatur in part precisely because the mooting party had acted in "good faith." 282 F.3d at 54.

Similarly, the en banc court below held that "[w]hether a party's voluntary conduct was not done with specific intent to moot the case is certainly one factor we may consider, but the absence of such specific intent does not outweigh other equitable factors." Pet. App. 10a. That approach was repeated in a more recent Fifth Circuit case, *Houston Chronicle Publishing Co. v. League City*, 488 F.3d 613, 619-20 (5th Cir. 2007), where the defendant city caused the case to become moot

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[11] The County also cites *American Family Life Assurance Co. v. FCC*, 129 F.3d 625 (D.C. Cir. 1997). *See* Pet. 12 n.2. But that case involved an "unreviewed administrative order[]," a context in which this Court has directed vacatur when mootness precludes court review. 129 F.3d at 630. Even then, the D.C. Circuit recognized the importance of "the equities," explaining that the order could cause collateral harm and that the mooting company's successor was not seeking to take advantage of the situation but was instead arguing "that the case is still alive." *Id.* at 631.

by repealing the challenged ordinance while the case was on appeal. The Court denied vacatur not only because the city had caused the mootness by voluntary action, but also because the city had failed to show that the repeal "was not in response to the district court judgment." *Id.* at 620.

In sum, all the circuits (including the Fifth) agree both that there is a presumption against vacatur when the losing party unilaterally moots the case, and that the presumption can be overcome by policy considerations, the facts of the particular case, or the public interest. All the circuits also agree that an exemption to that presumption arises when the mootness results from legislative amendment, though the presumption will apply if the legislature passes the amendment in order to undo the decision, if the legislators are themselves the parties-defendant, or if other equitable considerations counsel against vacatur. To claim that these principles establish an "automatic rule" is to stretch that term beyond recognition.

C. The En Banc Court's Denial of Vacatur Is Consistent with the Rulings of the Other Circuits.

The County claims that retention of the district court's judgment is inequitable for five reasons: (1) the judgment is outdated and erroneous (Pet. 7, 14-15); (2) the decision will impede the redisplay of the monument (Pet. 16); (3) the decision deprives Harris County residents of the ability to view the monument (Pet. 16); (4) the decision will "chill the exercise of activities protected by the First Amendment" (Pet. 16); and (5) retention of the decision subjects the County to an award of attorneys' fees (Pet. 15-16).

As a threshold matter, by making these *equitable* arguments, the County takes the very same approach that it faults the en banc court for having taken. *See* Pet. 13 ("the Fifth Circuit [evaluated] a broad mix of factors, many of which had nothing to do with the relevant inquiry under *Munsingwear* and *Bancorp*"); *id.* at 14 ("None of th[e] factors [considered below]

speaks to the relevant question, which is whether the County's attempt to appeal was 'frustrated by the vagaries of circumstance.'" (quoting *Bancorp*, 513 U.S. at 25)). The considerations to which the County points likewise have "nothing to do" with the nature of the mooting action. Rather, they are pleas directed at the equities.

That reality highlights two important points: that some resort to equitable considerations is not only unavoidable but essential to achieving a fair result on vacatur; and that the County's Petition is, in actuality, a request that this Court substitute its own equitable analysis for the analysis of the court below. But having this Court look over the en banc court's shoulder in performing an equitable inquiry is not an efficient or desirable use of this Court's scarce resources. That is so not only because this Court generally does not review decisions to address their "correctness"(*see Ross v. Moffitt*, 417 U.S. 600, 616 (1974); Sup. Ct. R. 10), but also because the Court's decision would be case-specific, making it of minimal use to the lower courts in other cases.

In any event, the County's list of equitable considerations is grossly incomplete. It disregards the facts that this case has been pending for more than four years and that the district court's decision had been affirmed on appeal before the mooting event occurred. *Cf. Adarand Constr., Inc. v. Slater*, 528 U.S. 216, 224 (2000) ("It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought."). It ignores the County's announced intention to redisplay the monument and the judicial and public interest in precluding relitigation of "the identical issues by the same parties under the same circumstances." Pet. App. 14a; *cf. Valero*, 211 F.3d at 121 ("given that . . . there is no suggestion of the[] likely reenactment [of the challenged

statutes], we see the public interest as no bar to vacatur").[12] And it ignores the fact that the County failed to timely inform the courts of potential mootness. *Cf. Arizonans*, 520 U.S. at 74-75 (ruling against plaintiff on vacatur in part because she had failed to timely inform court of mooting event); *id.* at 68 n.23 (holding that "[i]t is the duty of counsel to bring to the federal tribunal's attention, *without delay*, facts that may raise a question of mootness" (internal quotation marks omitted)).

All these factors, when considered alongside the fact that the mootness resulted from the County's unilateral action, subject the County to a weighty presumption against vacatur. Indeed, the burden is even greater here than it was in *Bancorp*: If the impetus for settlement is diminished when "an unfavorable outcome can be washed away by a settlement-related vacatur" (*Bancorp*, 513 U.S. at 28), then the impetus is virtually eliminated if an unfavorable outcome can be washed away by unilateral action in which the other side need not even acquiesce.

Yet the County's cited considerations carry little if any countervailing weight. *Bancorp* forecloses the argument that the district court's ruling was erroneous. 513 U.S. at 27 ("It seems to us inappropriate . . . to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits."). In any event, although the district court's decision was issued before this Court's rulings in *McCreary* and *Van Orden*, even with the benefit of those decisions, the legal standard (*compare* Pet. App. 33a n.6 *with id.* at 64a-65a), half the reviewed rationale (*compare id.* at 43a-45a *with id.* at 74a-76a), and the ultimate outcome in the case remained unchanged. Accordingly, the County grossly

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[12] It was likewise clear in the other cases that the County cites that the challenged behavior would not be repeated, though the courts considered that fact in relation to mootness rather than vacatur. *Rendell*, 484 F.3d at 241; *Brooks*, 462 F.3d at 348; *Khodara*, 237 F.3d at 194; *NBPA*, 108 F.3d at 349; *Dilley*, 64 F.3d at 1369.

exaggerates when it asserts that the district court's decision is erroneous and outdated, and that it was "largely rejected" by the panel. Pet. 14-15.

Nor does the granting of rehearing en banc suggest disagreement with the panel's ruling. *Cf.* Pet. 7. Indeed, the en banc court expressly disavowed any conclusion that Staley's "claim lacked merit." Pet. App. 13a. The court could very well have thought that "the proceeding involve[d] a question of exceptional importance" (Fed. R. App. P. 35(a)(2)); or the court could have been motivated by concerns about justiciability rather than the merits, for it requested briefing on justiciability just eleven days after it granted rehearing.

The County is being either disingenuous or hyperbolic when it complains that the district court's decision will impede the County's ability to redisplay the monument. Pet. 16. Either the County will redisplay the monument or it won't.[13] The injunction, of course, serves as no impediment to the latter course. And if the County pursues the former, the injunction would prevent only those acts that are "within its terms as reasonably construed" (*Sierra Club v. Callaway*, 499 F.2d 982, 991 (5th Cir. 1974)); and the en banc court has already held that the new display would be subject to a new "fact-intensive and

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[13] So there is no ambiguity: The County stated below that "[*w*]*hen* the Monument is again displayed to the public, it *will* be in a different location." County's En Banc Br. 8 (emphasis added). Staley's counsel also brought to the attention of the en banc court at oral argument that the *Houston Chronicle* had reported, just the day before, that the County Attorney had declared that the County intends to "install the monument elsewhere on county property and put the Bible back in it" and that "doing so would be constitutional." Murphy, *supra* note 7, at A1. The County Attorney emphasized that "No Commissioners Court member has said he doesn't want to put it back up." *Id.* Appreciating the distinction between "when" and "if," the en banc court concluded after reading the briefs and hearing oral argument that "the County has pledged to display the monument again after the renovations" (Pet. App. 13a), and that the "County specifically has asserted that it will display the monument again after the renovations are complete" (*id.* at 3a).

context-specific analysis" (Pet. App. 6a). Indeed, the County has claimed that "[t]he redesign of the Courthouse and plaza will make it physically impossible to return the Monument to its past location" (Pet. 5 n.1), and that the new display would thus arise in an entirely different location and context than the old display (*see* County's En Banc Br. 10). So why does the County care about the retention of an injunction that reaches only those actions that the County purports to have neither the intention nor the ability to pursue?[14] And if there is some ambiguity about the injunction's reach, or if circumstances change sufficiently as a result of the renovation and the intended redisplay of the monument, the County can move to clarify, lift, or modify the injunction. *See ICEE Distrib., Inc. v. J & J Snack Foods Corp.*, 445 F.3d 841, 850 (5th Cir. 2006).[15] Lifting the injunction now, rather than after circumstances have developed, would have the perverse effect of allowing the County to return the monument to precisely the same location, in precisely the same context, that the district court and a panel of the Fifth Circuit declared unconstitutional.

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[14] Having prevailed on the argument that the redisplay would arise in an entirely different factual context and would thus be subject to an entirely new constitutional analysis (*see* Pet. App. 6a), the County is judicially estopped from arguing that retaining the district court's decision would "impede" the redisplay. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the [other] party . . . .") (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *id.* at 750-51.

[15] A ruling on such a motion would be governed by Fed. R. Civ. P. 60(b)(5) (*see Valero*, 211 F.3d at 117), which provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] . . . it is no longer equitable that the judgment should have prospective application." In ruling on a Rule 60(b)(5) motion, a court may recognize changes in both facts and law. *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

Similarly disingenuous is the County's concern with the "'millions of Harris County residents who have had a possibly constitutional public monument removed at the request of one individual.'" Pet. 16 (quoting 23a n.2 (DeMoss, J., dissenting)). If as the County asserts, the monument's removal was driven by the courthouse renovation, the removal would have taken place whether or not the district court's decision was retained.[16] It is the monument's *return* that may be affected by the district court's decision; and as addressed above, whether the decision would have any effect on the new display will depend on the new circumstances and can be assessed by the district court upon motion.

The County's concern that the district court's decision will "chill the exercise of activities protected by the First amendment" is almost incomprehensible. The only explanation the County provides for this assertion is that "governmental authorities will likely curtail their tolerance for religious speech, for fear of being subjected to litigation." Pet. 16. But the display at issue here is *government* speech, not private speech. *See* Pet. App. 70a-72a; *see also* note 2, *supra*. As the County undoubtedly knows, there is a world of difference between the two. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-35 (1995). And a court decision about any one government display is so fact-intensive that it is unlikely to have a substantial effect on even another *government* display, let alone a private one.[17]

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[16] The district court ordered removal of the Bible, not of the monument as a whole. *See* Pet. App. 82a, 85a.

[17] *See McCreary County*, 545 U.S. at 867 ("under the Establishment Clause detail is key"); *Modrovich v. Allegheny County*, 385 F.3d 397, 402 (3d Cir. 2004) (challenge to religious display "requires a fact-specific, case-by-case analysis"); *King v. Richmond County*, 331 F.3d 1271, 1276 (11th Cir. 2003) ("each [religious-display] challenge calls for line-drawing based on a fact-specific, case-by-case analysis").

Further reducing the decision's impact is the fact that, as a district-court ruling, it has no controlling effect on any court or any other case — even one arising in the same federal district. 18 Moore's Federal Practice 3d § 134.02[1][d] (1997). The effect of the decision on other displays is limited to its persuasiveness, so the notion that the ruling could pose a threat to others' free speech borders on frivolous. And even if the decision were to have an effect on other cases, that would not be a valid ground on which to award vacatur. *Bancorp*, 513 U.S. at 27; *cf. 19 Solid Waste*, 76 F.3d at 1145 (dismissing argument that district court's decision could be used offensively in other cases because "[t]his factor should have been considered by the City in deciding whether to advocate dismissal of the claim").

Finally, the County's liability for attorneys' fees is not one of the "very real consequences" (Pet. 16) of the retention of the district court's decision: That liability arises whether the decision is vacated or retained. *See* Part II, *infra*.

In sum, the considerations to which the County points barely register on the scale, much less outweigh both the *Bancorp* presumption and all the case-specific considerations that disfavor vacatur here.

II. There Is No Circuit Split Regarding Staley's Entitlement to Attorneys' Fees.

Although the Petition focuses principally on the alleged circuit split regarding vacatur, the County frames its proposed question as whether "the court of appeals correctly declined to vacate the judgment of the district court, *thereby awarding fees to respondent as a 'prevailing party,'* when factors unrelated to the litigation had mooted the appeal." Pet. i (emphasis added). That wording, together with the County's treatment of the attorney-fee award as one of the "consequences" of retaining the district court's decision (Pet. 16), erroneously suggests that

the County's liability for attorneys' fees is dependent on whether the district court's decision is vacated.[18]

In *Crowell*, 444 U.S. at 505, this Court vacated a district-court order invalidating a legislative voting plan after the state legislature enacted a new plan that mooted the appeal. In vacating, however, the Court noted that the plaintiffs may still "wish to . . . apply for attorney's fees," making plain that vacatur does not preclude a fee award. *Id.* at 506; *accord Monzillo v. Biller*, 735 F.2d 1456, 1463 (D.C. Cir. 1984) (citing *Crowell* as holding that plaintiff whose case is mooted while on appeal can "still apply for attorneys' fees in the district court").

To be sure, *Crowell* said only that the plaintiff could "apply" for fees, not that fees would necessarily be granted. But the lower courts have had little difficulty with the reserved question, unanimously concluding that a civil-rights plaintiff who prevails in a final judgment in the district court is entitled to fees if the case becomes moot on appeal, even if the decision is vacated. *See, e.g.*, *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003) (plaintiff entitled to fees even though decision vacated during pendency of appeal upon plaintiff's graduation); *Liberty Res., Inc. v. Se. Pa. Transp. Auth.*, 54 Fed. App'x 769, 771 (3d Cir. 2002) (plaintiff still had

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[18] The County claims that "the majority held that Ms. Staley was entitled to fees *by virtue of the court's own refusal to vacate the judgment.*" Pet. 5 (emphasis added) (quoting the following sentence: "Given our opinion today, Staley has obtained the primary relief she sought and therefore remains the prevailing party." (Pet. App. 15a)). But immediately before the quoted sentence, the en banc court explains that "[a] determination of mootness neither precludes nor is precluded by an award of attorneys' fees. The attorneys' fees question turns instead on a wholly independent consideration: whether plaintiff is a 'prevailing party.'" Pet. App. 15a (quoting *Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir. 1980)). It is thus clear, when the quoted sentence is read in context, that the en banc court's decision on attorneys' fees was not premised on the court's rulings on mootness and vacatur. The phrase, "Given our opinion today," refers not to the denial of vacatur, but to the court's having failed to reach (much less reverse) the merits of the district court's decision because the case had become moot.

"right to collect attorney's fees" even though summary judgment in its favor had been vacated after case became moot while on appeal); *Bishop v. Comm. on Prof'l Ethics & Conduct*, 686 F.2d 1278, 1290-91 (8th Cir. 1982) (plaintiff-attorney entitled to attorneys' fees as a result of favorable district-court decision invalidating state disciplinary rules, even though case was ultimately mooted by attorney's disbarment and district court's decision was vacated); *Bagby*, 606 F.2d at 415-17 (awarding attorneys' fees on basis of plaintiff's having prevailed in district court, even though case became moot on appeal and district court's decision was vacated); *cf. Associated Gen. Contractors v. City of New Haven*, 41 F.3d 62, 68 n.9 (2d Cir. 1994) (remanding for determination on attorneys' fees, even though case became moot during appeal and district court's decision had been vacated, because "mootness is not determinative as to the propriety of an award of attorney's fees. . . . The attorneys' fees question turns instead on a wholly independent consideration: whether plaintiff is a prevailing party") (internal quotation marks omitted); *Martinez v. Wilson*, 32 F.3d 1415, 1422 & n.8 (9th Cir. 1994) (denying attorneys' fees because plaintiffs had not received any benefit from their victory below, but noting: "That a decision favorable to a section 1983 plaintiff is later vacated as moot does not alter the plaintiff's status as a prevailing party provided the plaintiff achieved that status before the case was rendered moot."); *Lafferty v. Humphrey*, 248 F.2d 82, 84-85 (D.C. Cir. 1957) (concluding that counsel had "achieved substantial benefits" for plaintiff class, and were thus entitled to attorneys' fees from government fund, even though favorable judgment had been vacated as moot).[19]

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[19] Attorneys' fees are likewise available, of course, if the district court's decision is retained upon a finding of mootness. *See, e.g., Houston Chronicle*, 488 F.3d at 624; *cf. Ford*, 469 F.3d at 506-07 (denying vacatur and remanding for assessment of attorneys' fee in case that had become moot on appeal); *Constangy*, 851 F.2d at 842 (same).

Indeed, that was the very result in the *NBPA* litigation that the County cites regarding vacatur. In a subsequent installment of the case, the D.C. Circuit held that the plaintiffs were entitled to a fee award under § 1988 even though the Circuit had vacated the district court's injunction in its earlier decision. *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999).

The County has not cited a single circuit-court decision reaching a contrary holding; and to our knowledge, none exists. The County does cite *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) (*see* Pet. 8, 15), but that decision expressly reserved, and did not decide, the question whether the plaintiff was entitled to fees. *See id.* at 483. (And the mootness there resulted from the actions of a non-party (*id.* at 475) — a context in which the equities are different than they are here.) The County also cites *Alioto v. Williams*, 450 U.S. 1012, 1013-14 (1981) (Rehnquist, J., dissenting from denial of certiorari). *See* Pet. 8, 15. But that is not a decision of the Court. And even if it were, the claim to attorneys' fees in that case rested on the plaintiff's having obtained a preliminary, rather than permanent, injunction (*see id.* at 1013 (noting that "[n]o permanent injunction ever issued")) — a situation presenting more complex equities that *have* produced a circuit split. *Compare, e.g., Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), *with Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002). *See generally Sole v. Wyner*, 127 S. Ct. 2188 (2007).

The County blurs the distinction between preliminary and permanent injunctions, repeatedly referring to the latter as "preliminary" merely because they are subject to appellate review. Pet. 7-8, 15. But the courts holding preliminary injunctions inadequate to justify fees have based their rulings on the particular nature of a preliminary, as opposed to a permanent, injunction — not on the availability of appellate review. *See Smyth*, 282 F.3d at 276 (finding fees unavailable because "the merits inquiry in the preliminary injunction

context is necessarily abbreviated" and "a court is guided not only by its assessment of the likely success of the plaintiff's claims, but also by other considerations, notably a balancing of likely harms"); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558-59 (3d Cir. 2003) (finding fees unavailable because preliminary injunction "not based on the merits" of plaintiff's claim).

Finally, even if this Court were inclined to give the lower courts guidance on the availability of attorneys' fees when a case becomes moot on appeal, this case would be a particularly poor vehicle for doing so. Staley's claim to fees rests on having prevailed not just before the district court, but before a panel of the court of appeals. Furthermore, the mootness here resulted from unilateral action taken by the losing party below, rather than from action taken by the winning party or from circumstances unattributable to either party. The Court's guidance would be of greatest use in a case in which the losing defendant had no responsibility for the mootness (*see, e.g.*, *Murphy*, 334 F.3d at 470-71) — a situation in which the legal questions are more difficult and the equities more balanced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007

APPENDIX

APPENDIX A

[SEAL]

Michael A. Stafford
Harris County Attorney

NOTICE

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DATE: January 19, 2007

PLEASE DELIVER THE FOLLOWING PAGES TO:

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FIRM: Fifth Circuit Court of Appeals

FAX NO: 504-310-8384

DOCUMENT: Resolution

FROM: John R. Barnhill
First Assistant County Attorney

TELEPHONE NO: (713) 755-7880 FAX NO.: (713) 755-1553

NUMBER OF PAGES: 2 PLUS TRANSMITTAL SHEET

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MICHAEL YANCEY, AIA [SEAL]
Director
Facilities & Property Management

1310 Prairie, Suite 1330
Houston, Texas 77002
(713) 755-5091
(713) 755-8802 fax

Vote of the Court:

	Yes	No	Abstain
Judge Eckels	☒	☐	☐
Comm. Lee	☒	☐	☐
Comm. Garcia	☒	☐	☐
Comm. Radaok	☒	☐	☐
Comm. Eversole	☒	☐	☐

February 11, 2004

Honorable County Judge
And Commissioners Court
1001 Preston Avenue, 9th Floor
Houston, Texas 77002
Attention: Commissioner El Franco Lee

RE: Request for Approval of a Resolution

Dear Court Members:

The Facilities and Property Management Department requests Commissioners Court approval of the attached resolution approving the Master Preservation Plan for the restoration of the 1910 Civil Courthouse, authorizing grant application to the Texas Historical Commission, and authorizing Harris County Judge Robert Eckels to act as the representative pertaining to the County's participation in the Texas Historic Courthouse Preservation Grant Program. The resolution is a requirement of the Texas Historical Commission and will be included in the grant application.

Your favorable consideration of this request is appreciated.

Very truly yours,

/s/ Michael Yancey

Michael Yancey
Director

MDY/dm
Attachment

cc: Commissioner El Franco Lee, Precinct One
Randy Moore, FPM
Dan Reissig, FPM
Agenda File

Presented to Commissioner's Court

FEB 17 2004

APPROVE [initialed]_____

Recorded Vol ____ Page _____

[Seal]

Resolution

A Resolution of the County Commissioners Court of the County of Harris, Texas, approving the Master Preservation Plan for the restoration of the 1910 Harris County Civil Courthouse, authorizing the submission of an application to the Texas Historic Courthouse Preservation Program, and authorizing the County Judge to act as the authorized representative in all matters pertaining to the County's participation in the Texas Historic Courthouse Preservation Program.

WHEREAS, Harris County Commissioners Court desires to preserve the County's historic courthouse which was built in 1910 and is one of the most significant historical structures in Houston; and

WHEREAS, Harris County, in the State of Texas, is qualified to apply for funds under the Texas Historic Courthouse Preservation Program, created by the enactment of HB 1342 by the Texas Legislature in 1999 and administered by the Texas Historical Commission; and

WHEREAS, Harris County Commissioners Court recognizes that the future use of the Courthouse is an integral part of the County's downtown complex, and in addition, the building is in the heart of the City of Houston's historic downtown and has a historical symbolic role to play; now, therefore

BE IT RESOLVED by the County Commissioners Court of Harris County, Texas that:

1 the Master Preservation Plan for the restoration of the 1910 Civil Courthouse is hereby approved;

2 an application for the Texas Historic Courthouse Preservation Program is hereby authorized to be filed on behalf of Harris County; and

3 Harris County Commissioners Court hereby authorizes the County Judge to act as the authorized representative in all matters pertaining to the County's participation in the Texas Historic Courthouse Preservation Program.

PASSED AND APPROVED by the Harris County Commissioners Court in Houston, Texas, on the 17th day of February, 2004.

/s/ Robert Eckels
ROBERT ECKELS, County Judge

/s/ El Franco Lee
EL FRANCO LEE, Commissioner
Precinct One

/s/ Sylvia R. Garcia
SYLVIA R. GARCIA, Commissioner
Precinct Two

/s/ Steve Radack
STEVE RADACK, Commissioner
Precinct Three

/s/ Jerry Eversole
JERRY EVERSOLE, Commissioner
Precinct Four

ATTEST

/s/ Patricia Jackson
Patricia Jackson,
Deputy County Clerk
Harris County, TEXAS

APPENDIX B

[SEAL]

Michael A. Stafford
Harris County Attorney

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Timeline

November 1993	Voter approval of $85 million in bonds for the Criminal Justice Center
November 1999	Voter approval of $119 million in bonds for the Civil Courthouse
August 25, 2003	Plaintiff Kay Staley filed her complaint
September 18, 2003	First Amended Complaint was filed
February 17, 2004	Comm. Ct. approved the Master Preservation Plan for the 1910 Courthouse
August 10, 2004	Final Judgment by Judge Lake entered ordering that the Bible be removed within 10 days and ordering attorney fees
March 2006	the courts vacated the1910 Courthouse and moved into the new Harris County Civil Courthouse
August 15, 2006	a panel of the 5th Circuit affirmed the decision of the District Court
November 7, 2006	Comm. Ct. approved a contract with Basic Industries, Inc. in the amount of $2,250,505 for selective demolition and abatement of the 1910 Courthouse, including removal of the Mosher Monument
December 11, 2006	Start date for demolition phase of reconstruction of 1910 Courthouse
January 19, 2007	the Mosher Monument is removed by the contractor and placed in storage.

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(3)

No. 07-100

FILED
OCT 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

HARRIS COUNTY, TEXAS,

Petitioner,

v.

KAY STALEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case provides the Court with the unique opportunity to address two distinct, recurring, and important legal issues, each of which merits this Court's review. First, this case provides the Court with an ideal vehicle for resolving a question on which the courts of appeals are clearly divided: the proper disposition of cases that are rendered moot by a party's voluntary conduct not related to the litigation. Second, this case also provides the Court with the opportunity to finally resolve whether an award of attorneys' fees is proper in cases mooted during appellate review.

I. Happenstance Prevented En Banc Review.

The Fifth Circuit granted en banc review to determine whether a divided panel had properly held that the Mosher Monument's (the "Monument") display of the Bible violated the Establishment Clause. As Staley concedes, shortly after granting rehearing on the merits, the Fifth Circuit ordered the parties to brief the issue of whether ongoing renovations to the Harris County Civil Courts Building (the "Courthouse") mooted the dispute. Opp. 5. In addition to contesting the merits, the County, as the Fifth Circuit ordered, briefed the mootness issue. The Fifth Circuit ultimately held that the renovations mooted the dispute. Pet. App. 6a.

Staley attempts to avoid the legal consequences of happenstance by implying that the County removed the Monument as part of a litigation strategy. Opp. 5. Not a single judge who heard the case en banc actually credited that assertion, and with good reason. As the en banc majority explained, the record leaves no doubt that "the bottom-line cause of the removal was related to the ongoing renovations." Pet. App. 10a. Indeed, in suggesting that the Monument may have been removed for tactical reasons, Staley primarily relies upon the proximity between the dates of the Monument's actual removal and oral argument before the en banc court. But a review of the timeline appended to Sta-

ley's opposition indicates that the renovation project began several years *before* Staley filed her complaint, and it remained ongoing while the litigation was pending. While the Courthouse was vacated in March 2006, the contract for demolition was not approved until November 7, 2006, and the demolition process did not begin until December 11, 2006. Opp. App. 9a. The Monument was placed into storage shortly after demolition began. Nothing about that timeline suggests that the long-planned, ongoing renovations were not the true reason for the Monument's removal. Indeed, at all times, including before the en banc court, the County vigorously argued that the Monument did not violate the Establishment Clause.

Staley also incorrectly asserts that the case was mooted "because the relief requested had been obtained." Opp. 6. That is not so. The case was mooted because changes in the circumstances that prevailed at the beginning of the litigation—in particular, the partial demolition of the Courthouse and removal of the Monument—prevented a final adjudication of Staley's constitutional challenge. Pet. App. 10a. Staley presumably would not contend that she "obtained" anything remotely approaching judicial "relief" if, following the Courthouse's destruction by an earthquake, the County had removed the Monument to facilitate reconstruction efforts. The supervening mootness that resulted from the renovation of the Courthouse should be treated no differently, and, under this Court's cases, just as obviously requires vacatur of the "preliminary" decision of the district court. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

II. Granting Certiorari Would Permit This Court To Clarify That *Munsingwear* Continues To Control The Disposition Of Controversies Mooted By An Appellant's Voluntary Actions That Are Unrelated To The Litigation.

For more than half a century, this Court has commanded that vacatur is "'the duty of the appellate court'" when review of a district court judgment is "prevented through hap-

penstance." *Munsingwear*, 340 U.S. at 40 (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)). Yet, substantial confusion exists among the courts of appeals regarding the proper disposition of cases mooted by events unrelated to the litigation, in part due to the circuit courts' inability to harmonize subsequent rulings by this Court that defined categories of mootness—other than happenstance—in which vacatur is not automatically available.

A prime example of this confusion is the Fifth Circuit's mistaken belief that this Court's ruling in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), somehow abrogated *Munsingwear*, leaving *all* questions of vacatur to be decided through an *ad hoc* equitable inquiry based on "the equities of the individual case." Pet. App. 10a. *Munsingwear*, however, sets forth a venerable rule of appellate practice that *requires* vacatur in certain circumstances—when mootness results from "happenstance." When a circuit court—sitting en banc, no less—concludes that this Court's "uniform rule" is no longer the law (*id.*), this Court's intervention is clearly warranted to restore clarity and uniformity to this important area of federal procedural practice.

1. To escape review of the Fifth Circuit's erroneous judgment, Staley first asserts that "[t]his Court has on several occasions addressed the legal standards to be applied in awarding vacatur." Opp. 7. It is true that this Court has held that litigants are not entitled to vacatur of the underlying decision if they give up their right to appeal via settlement (*Bancorp*), fail to prosecute their appeal (*Karcher v. May*, 484 U.S. 72 (1987); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)), or voluntarily abandon the conduct previously determined to be unlawful in a specific effort to moot the dispute (*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000)). These cases cited in Staley's opposition, however, provide little, if any, guidance on the proper disposition of cases that are mooted by voluntary conduct unrelated to the litigation, as is the case here.

Staley cites no case from this Court further illuminating "the legal standards to be applied in awarding vacatur" in cases of voluntary conduct unrelated to the litigation because—apart from *Munsingwear* itself—none exists. Like the Fifth Circuit, Staley simply takes it as self-evident that *Bancorp* somehow renounced *Munsingwear*. But *Bancorp* involved mootness caused by voluntary settlement—not happenstance. And even if *Bancorp*'s dicta could be fairly interpreted in the manner that the Fifth Circuit and Staley suggest, the Fifth Circuit remains obligated to follow the *Munsingwear* rule until this Court repudiates it. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Next, relying on the en banc majority's self-serving declaration that its holding did not "creat[e] a circuit split" (Pet. App. 12a), Staley asserts that there is no circuit split "when mootness results from the actions of the losing party." Opp. 11. By carefully commingling the analyses of cases involving an appellant's conduct that is related to the litigation (not happenstance) with cases involving voluntary conduct unrelated to the litigation (happenstance), Staley seeks to circumvent the true inquiry before the Court—*Munsingwear*'s ongoing applicability to cases mooted by conduct unrelated to the litigation, i.e., happenstance.

As the petition demonstrated, the Fifth Circuit's approach conflicts with that employed by the circuits who continue to follow *Munsingwear*'s rule. Pet. 10-13. Staley's opposition attempts to distinguish those cases by sheer *ipse dixit*, implausibly pigeonholing many of them into a previously unrecognized category of "legislative-amendment cases." Opp. 13-17. According to Staley, these cases constitute some sort of "exception" to the "*Bancorp* presumption against vacatur" rather than evidence of *Munsingwear*'s continued vitality. Opp. 13-15. This effort ignores reality. *Munsingwear* itself involved executive rather than legislative action. Rather than demonstrate some type of "exception" to *Bancorp*, each of the cases cited by the County illustrates that vacatur is the appropriate remedy when the "vaga-

ries of circumstance" (and not litigation-related decisions) prevent appeal.

Unable to distinguish the "non legislative-amendment case" of *Dilley v. Gunn*, 64 F.3d 1365, 1369-70 (9th Cir. 1995), Staley simply asserts that the Ninth Circuit takes the "same nuanced approach" that other circuits employ when considering cases of happenstance. Opp. 18. This assertion ignores the Ninth Circuit's unambiguous language to the contrary. As recently as last year, the Ninth Circuit declared that it "direct[s] vacatur" where "mootness [is] caused by . . . 'happenstance' or the 'vagaries of circumstance.'" *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (quoting *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999) (en banc)). That declaration echoed the Ninth Circuit's multiple previous holdings that vacatur is "'automatic'" for all cases where mootness results from happenstance. *Pub. Utils. Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (quoting *Dilley*, 64 F.3d at 1369); *see also Pub. Utils.*, 100 F.3d at 1461 ("[M]ootness resulting from happenstance . . . *does* require vacatur." (emphasis in original)). Indeed, Staley *concedes* that *Dilley* ruled that the mootness in that case "should be attributed to happenstance" if the mooting event was "'wholly unrelated to th[e] lawsuit'"—the County's position here—but suggests that this ruling is not a "blanket rule." Opp. 18. This might come as a surprise to the Ninth Circuit, which recently reaffirmed that *Dilley* reflects its "established practice." *Ctr. for Biological Diversity v. Lohn*, 483 F.3d 984, 990 (9th Cir. 2007) (reaffirming *Dilley* in yet another "non legislative-amendment case").

Here, despite recognizing that "the bottom-line cause of the [Monument's] removal was related to the ongoing renovations" to the Courthouse, and not litigation-related conduct, the Fifth Circuit refused to vacate as compelled by *Munsingwear*. Pet. App. 10a. In *Munsingwear*'s stead, Staley urges the Court to adopt the Fifth Circuit's freewheeling analysis where "[a]ll the equities must be considered." Opp. 11.

The Fifth Circuit's analysis of a variety of "equitable factors" to determine whether vacatur was appropriate stands in sharp contrast with the Ninth Circuit's clear and automatic application of the *Munsingwear* vacatur rule to cases mooted by happenstance. Furthermore, refusing to follow *Munsingwear*'s rule commanding vacatur in cases of happenstance thwarts vacatur's worthy purpose: to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41. This Court should grant the instant petition to clarify that vacatur is required in cases mooted by an appellant's actions when those actions are unrelated to the litigation.

2. Staley is wrong to suggest that the County advocates "the very same approach it faults the en banc court for having taken" (Opp. 20), merely because the County's petition demonstrated that the Fifth Circuit's "equitable" analysis is, in fact, inequitable. That the Fifth Circuit's ruling is highly questionable on its own terms merely confirms the unwisdom of that court's decision to ignore *Munsingwear*. And the County surely is entitled to point out that the equitable free-for-all that Staley urges as a rule has very little to recommend it when, as this case demonstrates, it produces results so demonstrably at odds with equity. The harm caused to the County by being subjected to a district court judgment that it cannot appeal illuminates the unfair consequences that result when courts eschew *Munsingwear*'s mandate to vacate judgments that are mooted by happenstance so as to prevent those cases from "spawning any legal consequences." *Munsingwear*, 340 U.S. at 41.

Staley also takes the position that because her judgment is of so little future value—it will not control the context-specific analysis of any future redisplay of the Monument—no real harm will be done by leaving it in place. Opp. 23-26 (arguing that the judgment will have no possible effect on the County's decision to redisplay the Monument, will be unlikely to affect any other display, and is only "a district-court ruling [that] has no controlling effect on any court or any other case"). This is, to say the least, a peculiar argu-

ment, which serves only to place in sharper focus the absence of any real justification for leaving the judgment in place. Staley's efforts to downplay the potential reach of the district court's judgment mask her true intent in seeking to preserve it. In addition to the effect that the district court's judgment would have on others (Pet. 14-18), Staley's opposition makes clear that Staley intends to use the unreviewable judgment to prevent any future display of the Monument. Opp. 24.[1] Unless reversed, the Fifth Circuit's decision not to vacate will clearly spawn legal consequences in violation of *Munsingwear*'s mandate.

III. The Petition Should Be Granted To Resolve The Recognized Issue Regarding The Availability Of Attorneys' Fees In Cases Mooted During Appellate Review.

Although entitlement to attorneys' fees is evaluated "separately from vacatur" (Opp. i), this Court has made clear that whether a plaintiff "can be deemed a 'prevailing party' in the District Court, even though the judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 483 (1990). In this case, the award of legal fees based on a decision "which in the statutory scheme was only preliminary" is especially problematic. *Munsingwear*, 340 U.S. at 40. Despite Justices of this Court describing "[t]he question raised here [a]s of significance," *Alioto v. Williams*, 450 U.S. 1012, 1013 (1981) (Rehnquist, J., dissenting from the denial of certiorari), the Court has never resolved whether, for "prevailing party" status, a preliminary victory before the district court must be tested through appellate review. The instant petition

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[1] The Fifth Circuit specifically recognized the potential effect that retaining the judgment would have on any future display of the Monument. *See* Pet. App. 14a.

presents a unique opportunity to squarely address this important issue.

Staley argues that certiorari is not necessary for this issue because "the lower courts have . . . unanimously conclud[ed] that a civil-rights plaintiff who prevails in a final judgment in the district court is entitled to fees if the case becomes moot on appeal, even if the decision is vacated." Opp. 27. But unanimity in an error hardly justifies its blind perpetuation. Surely this Court's review cannot be circumvented in cases where circuit courts erroneously apply the law simply because the erroneous practice appears unanimous. *See generally Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 621 (2001) (Scalia, J., concurring) ("[O]ur disagreeing with a 'clear majority' of the Circuits is not at all a rare phenomenon. Indeed, our opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts." (emphasis in original)).

As a plain matter of statutory interpretation, it has long been clear that attorneys' fee awards are dependent on a plaintiff's ability to "succeed ultimately" and are not available merely because of success in a "preliminary, incomplete . . . merits examination." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 276-77 (4th Cir. 2002); *accord Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983) (plaintiff cannot recover fees on unsuccessful claims, even if she was successful on other claims). Indeed, as this Court observed last Term, a fee award is improper when a litigant, although prevailing during a preliminary stage of the litigation, "leaves the courthouse emptyhanded." *Sole v. Wyner*, 127 S. Ct. 2188, 2192, 2196 (2007) (describing district court victory as merely winning a "battle"). The conclusion that Staley was not a "prevailing party" when the Fifth Circuit ordered that she receive fees is especially compelling in light of *Munsingwear*, a case that was part of the firmly established legal backdrop when 42 U.S.C. § 1988 was enacted and of which Congress was presumably aware. *See, e.g., Callanan v. United States*, 364 U.S. 587, 594 (1961) ("Congress is,

after all, not a body of laymen unfamiliar with the commonplaces of our law . . . . We attribute to Congress a tacit purpose . . . to maintain a long-established distinction" set forth in the case law. (citation and internal quotations omitted)). *Munsingwear* squarely confirms that Staley's victory in district court was "only preliminary" and should not spawn any legal consequences after the case became moot. *Munsingwear*, 340 U.S. at 40; *see also Kay v. David Douglas Sch. Dist. No. 40*, 484 U.S. 1032, 1034 (1988) (White, J., dissenting from the denial of certiorari).

Even if Staley's position were otherwise a plausible reading of the statute, this Court would have to reject it because of the grave constitutional doubts that such an interpretation would create. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As this Court noted in *Bancorp*, "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy." 513 U.S. at 21. That principle, of course, does not prescribe complete paralysis, and a court may properly take such actions to dispose of the case as vacating the lower court judgment or awarding costs. *Id.* But it is entirely a different thing to say that a court may also, as the Fifth Circuit did here, decide that one of the parties to a moot controversy should be paid compensation by the other party under a statutory regime that governs the shifting of attorneys' fees. This Court's cases have long held that Article III courts lose the power to make such compensatory awards when a case becomes moot. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 451-52 (1911) (plaintiff not entitled to "any compensation or relief" in the form of civil contempt fines when the underlying cause became moot); *see also Lewis*, 494 U.S. at 480 ("Th[e] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

Here, the County "should not be forced to bear an award of fees where [it] ha[s] never been finally determined [that the County has] violated the Federal Constitution or laws

and ha[s] steadfastly maintained the contrary position." *Kay*, 484 U.S. at 1034 (White, J., dissenting from the denial of certiorari). Where "petitioner[] exercised [its] right to appeal," no such finality is available because "the propriety of the injunction was being challenged . . . at the time the case became moot and the appeal dismissed." *Alioto*, 450 U.S. at 1013 (Rehnquist, J., dissenting from the denial of certiorari). This Court has thus identified an important issue that merits resolution: whether absent the finality of appellate review, a district court injunction is too preliminary to sustain "prevailing party" status. *See generally Kay*, 484 U.S. at 1033 (White, J., dissenting from the denial of certiorari) (recognizing "a conflict in the courts over the award of fees when the underlying action is rendered unreviewable after it has been filed"). This petition provides the appropriate vehicle for this Court to squarely decide whether "prevailing party" status requires a plaintiff to sustain a district court victory throughout the appellate process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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